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Supreme Court of the United States

OCTOBER TERM, 1956

No. 41

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, LOCAL No. 427, AFL, ET AL., PETITIONERS,

vs.

FAIRLAWN MEATS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

PETITION FOR CERTIORARI FILED MARCH 2, 1956
CERTIORARI GRANTED MAY 7, 1956

SUPREME COURT OF THE UNITED STATES

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INDEX

	Original	Print
Record from the Court of Common Pleas, Summit County, State of Ohio	1	1
Petition	1	1
Journal entry containing order granting temporary restraining order	7	4
Journal entry granting leave to file amended answer	9	6
Amended answer	10	6
Reply to amended answer	15	9
Transcript of testimony	18	11
Appearances	18	11
Excerpts from opening statement of Mr. Denlinger	19	11
Excerpts from opening statement of Mr. Riemer	24	13
Additional statement of Mr. Denlinger	25	13
Testimony of Sam Pollock, cross	29	15
Thomas Tandarich, direct	73	36
James Dougherty, cross	75	37
Harvey Ekers—		
Direct	92	45
Cross	110	58

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUG. 15, 1956

—793-0

	Original	Print
Record from the Court of Common Pleas, Summit County, State of Ohio—Continued		
Testimony of—Continued		
Eugene B. Moyer, cross	120	61
Harvey Ekers (recalled)—		
Cross	131	68
Redirect	159	80
Recross	169	87
Thomas J. Cook —		
Direct	180	93
Cross	185	95
Ray Thursby—		
Direct	189	96
Cross	191	98
Redirect	200	103
William H. Brigham—		
Direct	201	104
Cross	204	106
Eugene B. Moyer, direct	207	107
Offers in evidence	208	108
Motion to dismiss petition and vacate restraining order and denial thereof	210	109
Testimony of Sam Pollock—		
Direct	211	109
Cross	231	122
Redirect	247	128
Recross	249	129
David Rodocker—		
Direct	250	130
Cross	258	134
Helen Mayo, direct	267	137
David Seidmann, direct	270	138
T. W. O'Dell—		
Direct	272	139
Cross	274	140
Thomas Tandarich—		
Direct	275	141
Cross	277	142
Thomas Tandarich, recross	281	143
David Seidman (recalled)—		
Direct	282	143
Cross	284	145
Offers in evidence	287	146
Renewal of motion to dismiss and to vacate restraining order and denial thereof	290	148
Reporter's certificate (omitted in printing)	290	
Finding, Emmons, J.	291	148
Journal entry containing decree	302	156
Notice of appeal	304	158

	Original	Print
Proceedings in the Court of Appeals, Ninth Judicial District	305	158
Opinion, Hunsicker, J.	305	158
Motion for new trial or, in alternative, to certify record to Supreme Court	316	166
Journal entry containing decree	318	167
Journal entry denying motion for new trial and to certify	320	168
Notice of appeal	321	169
Proceedings in the Supreme Court of Ohio	324	170
Motion to certify	324	170
Journal entries of denial of motion to certify, dismissal of appeal and denial of application for rehearing	326	171
Application for rehearing	329	173
Clerk's certificate (omitted in printing)	331	
Exhibits:		
Plaintiff's Exhibit 2-A—Wage rates negotiated by Meat Cutters Local Union 427 with Cleveland Food Industry Committee	332	174
Plaintiff's Exhibit 2-B—Unsigned agreement	334	175
Plaintiff's Exhibit 5—Resignation of Thomas Tandarich from Ekers Packing House Market	342	184
Plaintiff's Exhibit 10—Letter dated March 5, 1954, from Earl C. Gibbs, Inc., to "Whom It May Concern."	343	184
Plaintiff's Exhibit 11—Resignation of Walter D. Carpenter from Fairlawn Meat, Inc.	344	185
Plaintiff's Exhibit 12—Signed statements by 41 employees of Fairlawn Meats, Inc.	345	185
Plaintiff's Exhibits 16 & 17—Resignations of Robert Vargo and Don Herbruck from Ekers Packing House Market	347	186
Defendants' Exhibit 15-A—Summary of cattle slaughtered and cattle purchased—Ohio and out of State of Ohio—by Earl C. Gibbs, Inc., September 28, 1953 to December 31, 1953	349	187
Defendants' Exhibit 15-B—Earl C. Gibbs, Inc., Account with Fairlawn Meats, Inc.,—summary of charges for months purchases year 1953	350	188
Defendants' Exhibit 25—List of employees with date of joining union and those who went on strike	351	188
Order allowing certiorari	352	189

[fol. 1] **IN THE COURT OF COMMON PLEAS**

No. 192338

No. 34542

PETITION—Filed February 8, 1954

1. Plaintiff is a corporation, duly organized and existing under and by virtue of the laws of the State of Ohio.

2. Local Union No. 427, Amalgamated Meat Cutters Union, affiliated with the American Federation of Labor, was, and still is, a voluntary, unincorporated association, made up respectively of a number of meat cutters residing in Akron and vicinity, members thereof, who are employed as such, in a number of meat markets in the City of Akron and vicinity; that defendants, Sam Pollock and James Daugherty, are officers and agents of said defendant union, and at all times hereinafter mentioned, acted and are still acting as the representatives of said defendant union, and within the scope of the powers and authorization.

3. Plaintiff is the operator of three meat markets located at 278 West Avenue, Tallmadge, Ohio; 2246 West Market Street, Akron, Ohio, and at the junction of U. S. Route #21 and State Route #176 in West Richfield, Ohio respectively; that as the operator of said meat markets, plaintiff is now, and for a long time has been possessed of a valuable good [fol. 2] will, trade and business, make up largely of a reputation for good meats which were sold to the public and has enjoyed the continued patronage of many hundreds of customers; that plaintiff employs approximately 50 employees in the three above places of business, and the good will, trade and business has been built up, maintained, and is dependent upon the care and skill with which plaintiff's employees serve the customers, and the kind and quality of the meat which plaintiff provides for its customers.

4. Plaintiff further avers, that its employees have at all times, been afforded the right to belong to any organization, labor or otherwise; that they have at all times had the right to bargain with the plaintiff, respecting their

wages, hours, and working conditions, either individually or collectively. Plaintiff's employees have at all times, had the right to employ or appoint any of their number or any other person or organization as their agent for the purpose of collective bargaining with the plaintiff.

5. Plaintiff's employees have been free from influence by the plaintiff as to whether they should deal with the plaintiff individually and directly, or collectively, through some agent appointed by them to represent them, in bargaining collectively with the plaintiff,

6. Plaintiff's employees have never requested plaintiff to negotiate and enter into a collective contract with them [fol. 3] or with any agent appointed by them. All of the plaintiff's employees, at all times, have dealt individually and directly with the plaintiff, respecting their wages, hours, and working conditions. On or about the 3rd day of February, 1954, the defendants and each of them, entered into an unlawful combination and conspiracy to injure and destroy plaintiff's good will, trade, and business, which said conspiracy still continues. The purpose of the conspiracy was and is to thereby compel and coerce the plaintiff to in turn coerce and compel his employees and each of them, to become members of said defendant union and to appoint the defendant union, or the officers thereof, as the exclusive agents for the purpose of collective bargaining with the plaintiff, or, in the alternative, to compel plaintiff to discharge its employees who refused to become members of said union, and to hire in the place of said employees therefor discharged, other persons who are members of said union and who have appointed the defendant union or its officers, as their exclusive agents, for the purpose of collective bargaining.

7. The plan of the defendants was, among other things, to prevent by force, violence, intimidation and persuasion, the operation of all of the meat markets of the plaintiff; to prevent by force, violence, intimidation, and persuasion, the entrance and exit of plaintiff's employees to and from the various meat markets of plaintiff; to so intimidate the [fol. 4] persons, firms, or corporations with whom plaintiff deals and the patrons of the plaintiff, so as to cause them to cease dealing with and patronizing plaintiff; to

prevent by force, violence, intimidation, and persuasion, the delivery of meats, foodstuffs, and supplies to the various meat markets of the plaintiff, all for the purpose of thereby coercing and compelling the plaintiff to in turn coerce and compel all of its employees to become union members and appoint and employ the defendant union, or the officers thereof, as their agents for the purpose of collective bargaining with the plaintiff.

8. In furtherance of said combination and conspiracy, defendants, acting in concert, on the 4th day of February, 1954, at 4:30 o'clock A. M., without notice to the plaintiff, caused a number of individuals to picket the meat markets of the plaintiff.

9. Plaintiff further avers that he has not joined said defendant union, and does not desire to join said union; and does not wish to be represented by said union and objects to being coerced to doing so.

10. Plaintiff further avers that there is no bona fide labor dispute in existence; that said pickets attempt to coerce customers from dealing with the plaintiff at his various markets and carry banners stating: "ON STRIKE". thereby intending to humiliate, annoy, disturb and coerce the plaintiff to join said union; that said acts of the defendants are a constant interference and nuisance [fol. 5] to the plaintiff in the operation of his business and subjects him to hardship, interference and intimidation; that the wording on said banners carried by said pickets is false and malicious and the patrons of the business of the plaintiff are led to believe that there is a dispute between the plaintiff and his employees, where as such it is not the fact, or that the plaintiff will not permit his employees to join the defendant union, where as such is not the fact; that defendants have prevented deliveries of the goods, meats, and merchandise to the stores of the plaintiff and that because of all of the unlawful acts of the defendants, plaintiff has been irreparably injured; that the good will, trade, and business of his meat markets has been irreparably damaged; that the damages sustained by the plaintiff are incapable of ascertainment; that plaintiff has no adequate remedy at law, and unless the relief requested is granted, plaintiff will be irreparably injured.

Wherefore, plaintiff prays that pending the final hearing and determination of the issues whereof, that defendant and their member of defendant union, their servants, agents, and employees and all other organizations acting in conjunction with them, be enjoined and restrained from engaging in any and all unlawful acts, and from interfering in any way with the plaintiff in the operation of his [fol. 6] various places of business, herein alleged, and that a temporary injunction against the illegal picketing and holding out to the world that the plaintiff is not a union man, be granted against said defendants, their agents, servants, and employees; that said defendants be enjoined from interfering with plaintiff in any manner in connection with the operation of the ingression or the egression of the various places of the business of the plaintiff and that upon final hearing whereof, a permanent restraining order and injunction be granted against said defendants, restraining them from their said illegal acts, and for such other and further relief as is just and proper in the premises, together with the cost of this suit.

(S.) Ray J. McGowan, Attorney for Plaintiff.

[File endorsement omitted]

[fol. 7] IN THE COURT OF COMMON PLEAS

JOURNAL ENTRY CONTAINING ORDER GRANTING TEMPORARY RESTRAINING ORDER—February 11, 1954

This cause came on to be heard on the application of the plaintiff for a temporary restraining order, and the evidence, and was submitted to the court. From the undisputed evidence that there is no evidence of a "strike" in either of plaintiff's two stores located at 278 West Avenue, Tallmadge, Ohio and 2246 West Market Street, Akron, Ohio; on consideration thereof, the court finds that the plaintiff is entitled to a temporary injunction against the defendants and each of them. It is therefore ordered, adjudged and decreed that the defendants, the officers and members of the Local Union No. 427, Amalgamated

Meat Cutters Union, affiliated with the American Federation of Labor, Sam Pollock and James Daugherty, their agents and employees, and each of them, be, and they are hereby temporarily enjoined and restrained:

1. From picketing, bannering or patrolling the stores adjacent to or in the vicinity of the plaintiff's places of business located at 278 West Avenue, Tallmadge, Ohio and 2246 West Market St., Akron, Ohio; from loitering [fol. 8] or congregating at or near any entrance of said places of business of the plaintiff as hereinabove stated.

2. From inducing or attempting to induce, any customer, prospective customers, or any person, firm or corporation with whom the plaintiff deals, not to deal with the plaintiff.

3. From in any manner preventing, interfering with, impeding, delaying or stopping any deliveries to the plaintiff or any food, meat, merchandise or supplies of any nature whatsoever.

4. From advising, protecting, aiding, abateing or assisting any person or persons in the commission of the acts hereby restrained.

It is further ordered that this restraining order be effective as to the following places of business, 278 West Avenue, Tallmadge, Ohio and 2246 West Market Street, Akron, Ohio, and it is further ordered that the temporary restraining order shall not apply to the place of business operated by plaintiff at the junction of U. S. Route #221 and State Route #176 in W. Richfield, Ohio. Bond $200.00. Exceptions to defendant.

(S.) Wanamaker, J., Judge.

[File endorsement omitted]

[fol. 9] IN THE COURT OF COMMON PLEAS

JOURNAL ENTRY GRANTING LEAVE TO FILE AMENDED ANSWER —March 26, 1954

Upon good cause being shown and on application of counsel for defendants, leave is granted defendants to file and serve an amended answer in the above matter.

(S.) Wanamaker, J., Judge.

[File endorsement omitted]

[fol. 10] IN THE COURT OF COMMON PLEAS

AMENDED ANSWER—Filed March 26, 1954

Now comes the defendants and leave of Court being first duly had, file their amended answer as follows:

1. The allegations of paragraph numbered 1 of the petition are admitted.

2. The allegations of paragraph numbered 2 of the petition are admitted except to say that the correct name of the defendant union is Amalgamated Meat Cutters and Butcher Workmen of North America, Local No. 427, a voluntary, unincorporated association.

3. Defendants admit that the plaintiff is the operator of three (3) meat markets as alleged in paragraph numbered 3 of said petition, but for want of knowledge deny each and every other allegation therein contained.

4. The allegations contained in paragraph numbered 4 of the petition are denied.

5. The allegations contained in paragraph numbered 5 of the petition are denied.

6. The allegations contained in paragraph numbered 6 of the petition are denied.

[fol. 11] 7. The allegations contained in paragraph numbered 7 of the petition are denied.

8. The allegations contained in paragraph numbered 8 of the petition are denied.

9. Defendants deny that plaintiff has been coerced to

be represented by this defendant union as alleged in paragraph numbered 9, and for want of knowledge deny each and every other allegation therein contained.

10. The allegations contained in paragraph numbered 10 of the petition are denied.

For their affirmative defenses to allegations contained in the petition, defendants plead further as follows:

11. On or about May 10, 1952, plaintiff and defendant union entered into a written agreement under the terms of which plaintiff recognized the union as the sole bargaining agent for all of its employees and agreed to meet with the union to negotiate a labor agreement and that when such agreement was concluded it would contain provisions establishing a union-shop and although the said agreement gave either party the privilege of terminating said agreement, plaintiff at no time prior to the filing of this action sent notice to the defendant of its intention to terminate said agreement.

12. From on or about February 4, 1954, to on or about [illegible]bruary 11, 1954, the defendant union and its members engaged in a lawful strike against the plaintiff by peace-[fol. 12] fully picketing plaintiff's operations at its three locations where it is engaged in business, until on the latter date defendants were restrained by a temporary restraining order of the Court of Common Pleas, Summit County, Ohio from further picketing of the plaintiff's business located at 278 West Avenue, Tallmadge, Ohio and 2246 West Market Street, Akron, Ohio, but were permitted to continue to picket the plaintiff's operation at West Richfield, Ohio and that said conduct has — all times been peaceful and orderly and for a lawful and legal objective.

13. Since on or about February 19, 1954, employees of the plaintiff employed by it at 278 West Avenue, Tallmadge, Ohio, members of defendant local union have been on strike.

14. These answering defendants further state that at no time since February 3, 1954, and down to the filing of the amended answer herein has there been any incident of unlawfulness or violence because of the presence of pickets and there has been no intimidation, coercion or restraint

of the plaintiff, its employees or the employees of any of plaintiff's customers of any other employer. The public has not been and is not being mislead as to the nature of the dispute; that entrances to the stores are not and have not been blocked and that ample ingress and egress has been permitted at all times to all persons; that shipments to and deliveries from the plaintiff, wherever situated have at no time been impeded or interfered with, nor any attempt made to do so; that defendants are not seeking the discharge of any of plaintiff's employees or the breach of [fol. 13] their employment rights with plaintiff.

For separate defenses to the petition, no one of which shall be considered a waiver of the other, these answering defendants further allege as follows:

15. The petition fails to state a claim against defendants upon which relief can be granted.

16. This court lacks jurisdiction over the subject matter of the petition for the reason that plaintiff is engaged in interstate commerce or that the subject of the petition involves a controversy arising out of a bona-fide labor dispute between plaintiffs and defendants affecting commerce and the free flow thereof and that the petition, as is apparent on the face thereof, alleges conduct constituting violations of the Labor-Management Relations Act, 1947, as amended, 29 U. S. C. A. Sections 141, et seq., exclusive jurisdiction over which is lodged in the National Labor Relations Board, subject to review in the federal courts, by the aforesaid Act of Congress and that plaintiff has a complete and adequate remedy at law under the provisions of the aforesaid federal statute.

17. Plaintiff has no claim to equitable relief, nor does it come into court with clean hands; it has not suffered, nor will it suffer irreparable injury and the conduct of the defendants invades none of plaintiff's rights guaranteed under the Constitution of the State of Ohio and is not in [fol. 14] conflict with or in violation of the law or public policy of the State of Ohio or of the United States.

Wherefore, these answering defendants pray that the petition be dismissed, that the temporary restraining order heretofore issued be vacated, that the relief requested by

plaintiff be denied and that defendants be allowed their costs herein assessed.

Smoot and Riemer, Attorneys for Defendants, 514 Bulkley Building, Cleveland 15, Ohio, SUperior 1-1930.

[File endorsement omitted]

[fol. 15] IN THE COURT OF COMMON PLEAS

REPLY TO AMENDED ANSWER—Filed April 14, 1954

1. Now comes the plaintiff and for its reply to the amended answer herein the plaintiff admits that a stipulation was entered into May 10, 1952 in the following words:

"This understanding entered into May 10, 1952 by and between the Ekers's Meats and Local Union 427 Amalgamated Meat Cutters and Butcher Workmen of No. America, A. F. of L.

"(1) The Employer agrees to recognize the Union as the sole bargaining agent for all of its employees.

"(2) The Employer agrees to meet with the Union to negotiate an agreement covering wages, hours and working conditions within two (2) week- of the signing of this Stipulation.

"(3) The Employer agrees that when an agreement is concluded it shall include a provision establishing a union security clause.

"(4) Nothing in this Stipulation denied either part the right to exercise their judgment in respect to the terms of the agreement to be negotiated, and either party may at their option cancel this Stipulation and exercise their respective rights after sincere effort has been made to conclude an agreement."

but respectfully alleges that said stipulation was without consideration, unenforcible and not binding upon this plaintiff.

2. Plaintiff denied that defendants were engaged in

legal strike from February 4, 1954 to February 11, 1954 [fol. 16] and respectfully alleges that said defendants did engage in striking and picketing against the plaintiff, but the same was for an illegal purpose.

3. Plaintiff admits that the Common Pleas Court of this County enjoined picketing at two of its stores, but permitted picketing at West Richfield, Ohio and denies that said picketing has been for a lawful and legal objective.

4. Plaintiff denies that since February 19, 1954 the employees of the plaintiff have been on strike at the Tallmadge, Ohio store.

5. Plaintiff denies that the picketing in which said defendants have been engaging since February 3, 1954 has not been free of intimidation, coercion and restraint and that the public has been deceived and misled and that entrance to the sohes *have* not been blocked and that shipments have been impeded and interfered with and that said defendants have engaged in a secondary boycott in that defendants have by intimidation and threats caused its chief supplier of meats to refuse to sell to this plaintiff and it has been required to obtain its merchandise elsewhere.

6. Plaintiff denies that the National Labor Relations Board has sole and exclusive jurisdiction of this matter and affirms its position that this Court has full jurisdiction [fol. 17] over the subject matter.

7. Plaintiff denies each and every allegation in paragraph 17 of the amended answer.

8. Wherefore, having fully replied, plaintiff prays for the relief sought in its original petition.

(S.) Stanley Denlinger, Attorneys for Plaintiff.

Duly sworn to by Stanley Denlinger. Jurat omitted in printing.

[File endorsement omitted]

[fol. 18] IN THE COURT OF COMMON PLEAS

FAIRLAWN MEATS, INC., Plaintiff,

vs.

LOCAL UNION No. 427, et al., Defendants

Transcript of Testimony

APPEARANCES:

Stanley Denlinger, Raymond J. McGowan, Robert Sheck, Attorneys at law, Akron, O., on behalf of Plaintiff.

Mortimer Riemer, Attorney at law, Cleveland, O., on behalf of Defendants.

Be It Remembered that upon the trial of the above entitled cause, on the 5th day of May, 1954, being a day in the April Term, 1954, of the Court of Common Pleas of Summit County, Ohio, before the Hon. C. V. D. Emmons, Judge presiding, the above cause came on to be heard and the following proceedings were had.

* * * * * * *

[fol. 19] EXCERPTS FROM OPENING STATEMENT OF MR. DENLINGER

The plaintiff, Fairlawn Meats, Incorporated, is a corporation of Ohio whose entire stock and holdings are owned by Mr. Bert Ekers and his wife. This plaintiff operates three places of business, a meat market out on 2246 West Market Street—that is the Sparkle Market there adjacent to Sand Run Road; and a market out here near Tallmadge —278 West Avenue, the former place of the Roccos—Bert [fol. 20] went in behind that bad situation there and has built up a very fine business at that location; and a market and cooler plant which has been acquired in the last several months on Route 176 in West Richfield, which is at the intersection of 176 and 21. The Court probably knows exactly where that is.

In the operation of these meat markets at these three locations the plaintiff employs approximately 50 people in all three places. There is no packing or slaughtering or that type of business conducted, it is a retail, over-the-

counter, largely of meats and eggs and butter and meat products, a very small amount of groceries—bread and some things like that. The purchases for these goods we sell are made entirely in the State of Ohio.

* * * * * * *

[fol. 21] During this long period of time prior to February 3rd, 1954, the defendant Union had been permitted by the plaintiff to interview the employees on the premises, on the Company's time, to induce the employees to join the Union. But the employees refused to join the Union and the employees indicated to the employer they did not want to join the Union.

So on February 3rd, 1954 (when the defendants, Pollock and Dougherty, insisted upon Mr. Ekers signing this contract for a Union shop, and he refused to do so, they immediately began picketing the three places of business, setting forth that Ekers Meats was unfair and on strike.

* * * * * * *

They are not employees picketing but many outsiders picketing.

* * * * * * *

[fol. 22] Now, the acts and conduct of these defendants has not only been to picket in groups of three and five at the driveways and entrances—stand right in the driveway, preventing the ingress and egress of customers to the place of business—but it has extended to going to Cleveland to the wholesale houses from which we have been making purchases of meat, and there inducing the wholesaler to refuse to sell products to us on the basis that the wholesaler would get in trouble if he continued to do so. And they discontinued selling to us.

* * * * * * *

—there being no dispute of any kind between the employees and the employer—the only dispute that arose here is the difference of opinion between the Union and the plaintiff as to whether or not the plaintiff must sign a contract compelling the employees of his stores to join this Union.

* * * * * * *

[fol. 23] We say that the evidence will prove to your Honor without question:

No. 1: We are not engaged in interstate commerce;

No. 2: We have refused to sign a contract which would require us to put our employees in the Union;

No. 3: This refusal to sign the contract brought about the picketing of our places of business;

No. 4: That in addition to the picketing, that they engaged in a secondary boycott in their acts and conduct towards this plaintiff;

No. 5: That those acts and conducts consisted of illegal acts which are enjoined in a court of equity.

* * * * * * *

[flo. 24] EXCERPTS FROM OPENING STATEMENT OF MR. RIEMER

* * * * * * *

The defendant, your Honor, in substance defends this action on two basic grounds:

First: We assert that under recent rulings of the United States Supreme Court, as to the plaintiff's operations affecting Ekers, that this Court has no jurisdiction to enjoin the peaceful conduct of the defendants in a controversy arising over a bona fide labor dispute, and where the alleged conduct of the defendants, as alleged in the petition, constitutes a violation of Federal Law.

* * * * * * *

[fol. 25] STATEMENT OF MR. DENLINGER

Mr. Denlinger: In the file you will find, your Honor, a copy of the order of Judge McNamee, and it says: "Upon consideration the Court finds that there are no allegations made in the plaintiff's petition showing a Federal question, or from which a Federal question may be inferred, and therefore finds this Court is without jurisdiction."

* * * * * * *

[fol. 26] They never had anybody on strike at West Market, and at this time—and this is the most they ever had—out of the fifty employees forty of them are still working. Only ten ever engaged in any picketing, your Honor please. And we have the resignation of four of that ten, that they are no longer our employees—voluntary [fol. 27] resignation—that they gave us after this started, and they are working some place else. So it boils down to this Union attempting to get for six of their members a contract that forty of the people do not want. And there will be offered in evidence in this case the signatures of all of these employees, your Honor, that I have mentioned —forty of them in which they direct to our attention that they are not in favor of signing any agreement to compel them to join the Union, and that they are satisfied with their wages, hours and working conditions.

* * * * * * *

this is an anomalous thing that I can't understand about this Union—if the Labor Board has the jurisdiction to select an agent here—and they claim they have because we are in interstate commerce—why don't they simplify this whole thing by going to the Labor Board, filing that little, simple petition for an election—it's all printed out with some blank spaces to fill in—and show the Board that they have sufficient interest in this employer that the Board will conduct an election. And the Board will determine whether or not they represent a majority, and if [fol. 28] they do represent a majority we will then by law be bound to recognize them without a picket line and the danger of being prosecuted for unfair labor practices if we do not negotiate and sign a contract. But they seek not to use the very law that they now say is applicable to this case to deprive this Court of jurisdiction. Why? Because they want to use the economic force of coercing this man in the compelling of his other forty employees to join a Union that they, over their signatures, say they do not wish to join.

* * * * * * *

the purpose of this picketing is not to settle any bona fide labor dispute but for the purpose of forcing this employer to put those people into their Union who do not wish to join.

. . . . . .

[fol. 29] SAM POLLOCK, called by the plaintiff for cross examination, being first duly sworn, testified as follows:

Cross-examination.

By Mr. Denlinger:

. . . . . .

Q. What is your business?

A. I am president of the Meat Cutters Local Union 427, affiliated with the Amalgamated Meat Cutters and Butcher Workmen of North America, A. F. of L.

Q. How long have you been in that position?

A. I have been in that position since May 12, 1953.

Q. Prior to that time what was your occupation?

A. My occupation was that of International Union representative.

. . . . . .

[fol. 30] Q. And Local 427 is made up of the employees of what business?

A. Employees who are employed in markets operating meat departments in a number of counties.

Q. What counties does Local 427 have jurisdiction over?

A. Cuyahoga, Summit, Stark, Portage, Medina, substantially.

. . . . . .

Our jurisdiction varies, depending on the circumstances. In markets which are combination markets, where groceries, produce and meats are sold in the area that we are in, we generally represent only the meat departments. There are some stores we have under our jurisdiction where the employees in the store, regardless of classification, are

members of our—that is, come under the terms of the agreement that we have negotiated for those particular places at various times. Our Union also has provision house employees, wholesale, retail—they might be porters, meat cutters, boners and so on.

. . . . . .

[fol. 31] Q. In other words, you claim your jurisdiction in a meat market is everybody that is employed by the operator of the meat market?

A. Excepting supervisory employees.

Q. You know Mr. Ekers?

A. Yes.

Q. How long have you known him, Mr. Pollock?

A. The first time I met him was in May, 1952.

Q. Where did you meet him?

A. At his store on West Market.

. . . . . .

Q. What was your conversation with Mr. Ekers?

A. I asked him to recognize the Union for collective bargaining purposes.

Q. How many members did you have at that time?

A. I don't recall.

. . . . . .

[fol. 32] Q. Just give how many employees of Mr. Ekers did your Union have in its membership in May, 1952, which is the time you say you talked to Mr. Ekers.

A. I'm sorry, I don't recollect. We had some membership.

Q. Can't you give us any idea?

A. We had some membership but I don't recollect.

Q. Can't you give me an idea whether it was five, ten or twenty?

A. I don't want to hazard a guess.

. . . . . .

Q. And you didn't inquire of your local union officers how many members you were representing in that contract?

A. I don't recall.

Q. You have no idea whether you had two or five or a majority?

A. I don't recall.

. . . . . .

[fol. 33] Q. Did you discuss union shop?

A. Yes, we discussed union shop.

Q. What did you say would be the terms that must be written into your agreement regarding the union shop?

A. Standard union shop agreement.

Q. You said he would have to sign that as other employers have signed it, is that right?

A. I never tell any one they have to do snything.

Q. Mr. Pollock, all your contracts with meat markets and packers contain the union shop clause, don't they?

A. That's right.

Q. Every contract you have with every person or company that runs a meat market must sign the contract with the union shop clause in it or you don't sign, isn't that correct?

A. No, that isn't altogether correct.

Q. Well, what is the exception?

A. The exception is that we never have told anybody they have to do anything against their wish.

Q. But they all do contain this clause, do they not?

A. Within my knowledge they all contain that clause.

Q. And you wouldn't sign a contract with Ekers without that clause, would you?

A. I don't know.

. . . . . .

Q. Do you know of a single contract that this Union, defendant in this case, has signed in all of these counties [fol. 34] that you say they operate in, that does not contain the union shop clause?

A. I don't know of any.

. . . . . .

[fol. 35] By Mr. Denlinger:

Q. Let me ask you the question: In 1952 you picketed Mr. Ekers place of business, didn't you?

A. That's right.

Q. While he was being picketed you then had a discussion with him with reference to taking the pickets off and recognizing your Union, isn't that right?

A. Yes.

. . . . . .

[fol. 36] Q. But after this was signed there was no picketing until February, 1954, was there?

A. Yes.

Q. That is correct?

A. That is correct.

. . . . . .

Q. Now, after May 10th, 1952, did you meet with Mr. Ekers at any time?

A. Yes, on several occasions.

. . . . . .

Q. I will hand you what has been marked for identification as Plaintiff's Exhibit 2 and ask you to examine those several papers and tell the Court what it is, if you know.

A. These are copies of our standard agreement. This is a copy of our standard agreement for the Akron area, and [fol. 37] then attached to it is a supplemental——

The Court: Why don't you refer to that as 2-A and 2-B?

Mr. Denlinger: I will be glad to.

The Court: Will you identify 2-A now?

The Witness: 2-A is a copy of the rates of pay negotiated by the Union with the industry, and which went into effect on June 1st, 1953, in certain areas, and which went into effect on September 1st in the Akron area, of 1953.

The Court: All right. 2-B?

The Witness: 2-B is our standard agreement for the Akron area which was negotiated and went into effect September 1st, 1952.

. . . . . .

Q. Now, can you tell the Court, if you can remember, any time that you discussed with Mr. Ekers the contents of [fol. 38] Exhibits 2-A and 2-B?

A. We had a number of meetings at which I was present with Mr. Ekers and Mr. Dougherty where we discussed negotiating an agreement, on several of those occasions——

Q. That was after the stipulation of May 2nd, 1952?

A. After the stipulation, yes.

Q. O. K.

A. We discussed, without any particular pattern, various provisions of the agreement—generally, on the basis of Mr. Ekers asking how this would apply or how that would apply, and what his problems were in relation to applying certain provisions. As I recall, one of the main problems of Mr. Ekers was the issue of Sunday operation and the employment of certain help who he felt were not qualified, who he said he had to employ because he couldn't get anybody else, and that he would need in order to make adjustments in his operation to come within the terms of the agreement. That was the gist of our conversations when the agreement, as such, was discussed.

Q. That was the discussion of hours then?

A. Discussion of hours?

Q. Yes.

A. I don't recall too much discussion on wages, but it was discussion of hours, discussion of Sunday operation.

Q. Discussion of the union shop?

A. Not the union shop provision itself.

Q. Did you ever attempt to talk to the employees at Tallmadge and West Market to join the Union on the company property?

A. I personally was never in those stores to talk to any of his employees.

* * * * * * *

[fol. 39] Q. So far as your records show, Mr. Ekers at no time showed any opposition of any kind toward you attempting to get his employees into the Union, is that correct?

A. Not altogether.

Q. What was the exception?

A. The exception is that while he did not forbid the representatives to contact and discuss Union with the people, that he did himself state that he did not want the Union in his place—he didn't like to see the Union come in, and he expressed himself that way to the people.

Q. To his employees?

A. To his employees.

Q. Were you present at any time that that happened?

A. No.

Q. Well, how did you know?

A. Mr. Ekers himself told me, personally.

Q. Mr. Ekers himself told you that he didn't want your Union in there. Is that right?

A. That he had talked to his people about that too.

Q. And what did he say about what his people thought about it?

A. He said that some of his people did not want to come into the Union.

Q. So that there was a duscussion with you and Mr. [fol. 40] Ekers about all his employees coming into the Union, wasn't there?

A. The discussion with Mr. Ekers on the question of his employees was always within the realm of how it would be done without any disturbance to his people or to his operation.

. . . . . .

[fol. 41] Q. But you included in that understanding that a union shop provision would be a part of a standard contract?

A. We never discussed whether it would or wouldn't be. We assumed, without discussing, that the stipulation providing for recognition and union shop would be made part of the contract, and our problem in all negotiations at the time with Mr. Ekers were the economic problems primarily—economic questions primarily.

. . . . . .

[fol. 42] Q. Mr. Pollack, will you tell the Court when this strike that brought about the picketing was called in this case?

A. The strike occurred on February 4th, 1954.
Q. When was it called?
A. It was called February 4th, 1954.
Q. Who called it?
A. Called by a vote of the members on February 2nd, 1954.
Q. Vote of what members?
A. The entire membership.
Q. The entire membership of what?
A. Of Local No. 427 present at the Akron section meeting.

• • • • • • •

Q. Were Ekers' employees represented?
A. They were present, some of them.
Q. How many of them?
A. I don't know.
Q. Any idea?
A. No, I haven't any idea.
Q. How many members were present at the taking of this strike vote?—Pardon me—was a strike vote taken?
A. A strike vote was taken on February 2nd, 1954.
Q. Strike vote was taken on February 2nd, 1954?
A. Yes.
Q. Who participated in that strike vote?
A. The members.

• • • • • • •

[fol. 43] Q. What was the number of membership at this meeting in round numbers?
A. I don't recall. Might have been 70—80—90 people.
Q. Less than a hundred, more than 50. Is that safe?
A. Possibly in those numbers.

• • • • • • •

Q. How many of Ekers employees were there?
A. I don't recall. I saw several.
Q. Can you give an idea?
A. I saw several there but I don't know how many, all told, were there.
Q. Was there less than ten?
A. I don't know.

• • • • • • •

[fol. 44] Q. You attended this meeting at which a strike vote was taken on February 2nd, 1954, is that right?

A. Yes.

Q. Did you speak at that meeting?

A. I made a report.

Q. What report did you make?

A. I made a report on our negotiations with Mr. Ekers.

Q. What did you report with reference to those negotiations?

A. That we had been unable as yet to reach an agreement with Mr. Ekers for an agreement covering wages, [fol. 45] hours and working conditions.

Q. What else did you say?

A. And asked for approval, in the event that it was necessary to call a strike, that the Union would authorize the calling of a strike.

Q. You suggested they call a strike?

A. I suggested they authorize the officers to call a strike in the event an agreement could not be reached.

Q. That was the 2nd of February?

A. That is right.

Q. Did you meet with Mr. Ekers after that?

A. February 3rd.

Q. What did you say to Mr. Ekers on February 3rd, 1954?

A. Mr. Ekers first told me that he didn't care to negotiate now. I advised him that this wasn't a satisfactory answer and asked him if he wouldn't enter into specific negotiations with the specific clause in the contract and try to work out an agreement. Mr. Ekers says, "I don't care to negotiate now. I am leaving the door open." I says, "That doesn't tell us anything."

Q. That is February 3rd?

A. That is February 3rd. I says, "We have been meeting now actively since October. We have had the stipulation since May, 1952, and we have been meeting since October, trying to resolve this problem. Can you understand that your answer isn't satisfactory? That we feel we have given sufficient time to the matter." We didn't ask him to sign a contract at that meeting, we asked him only to continue negotiations with us for *for* an agreement. And

Mr. Ekers said, "I don't care to negotiate a contract now." I said, "Well, under those circumstances you fully under-
[fol. 46] stand that we may exercise our right to strike."

The Court: That was after the strike had been called?

The Witness: That is after it had been—the officers had been authorized to call a strike in the event we couldn't reach an agreement, to strike.

The Court: That meeting was February 2nd?

The Witness: February 2nd, Union meeting.

The Court: That was when they elected to declare a strike?

The Witness: No. It was when they authorized the officers to call the strike when and if necessary in the event we couldn't reach an agreement. But we tried everything—I tried everything.

* * * * * * *

[fol. 47] Q. There was a meeting arranged between you and Ekers and Dougherty for Cleveland, February 3rd, is that right?

A. I believe so, yes.

Q. When had that meeting been arranged?

A. Well, that meeting was arranged on a sort of an indefinite basis. That is, after our last meeting with Mr. Ekers he was to let us know when he would meet with us again. So he held a meeting with some of his employees—I guess on a Monday, February 1st. We had our Union meeting February 2nd. Mr. Dougherty, as I understand it, contacted Mr. Ekers and asked him when we could have that meeting. The date February 3rd was suggested. And Mr. Ekers suggested that it would be all right to be in Cleveland since he was coming into Cleveland anyhow. And so he came to our office on February 3rd.

Q. What did he say to you?

A. He said, after some preliminary discussions, "I don't care to negotiate now. I don't want to close the door."

Q. What did he say about his employees not joining the Union?

A. He told me some of his employees didn't want to join the Union.

Q. He told you that February 3rd, 1954?

A. That's right.
Q. In your office?
A. Yes.
[fol. 48] Q. In the presence of Mr. Dougherty?
A. Yes, among other things.
Q. When did you start the picket line?
A. February 4th.
Q. What time in the morning?
A. I don't recall exactly the time—around five o'clock—six o'clock.
Q. Around five *O*'clock in the morning on the 4th of February? Is that right?
A. I believe so.

. . . . . .

[fol. 49] Q. Will you tell the Court who was picketing at the Tallmadge store, if you know.
A. Members of our Union?
Q. Members of the——
A. Members and officers of the Union.
Q. Of the Amalgamated——
A. That's right. Meat Cutters Local No. 427.
Q. Were there any employees of the Tallmadge store picketing on the 5th?
A. I don't think so.

. . . . . .

As I recall on February 4th, for the period of time that I was there I don't recall seeing any employees—that is, members of our Union—on the picket line.

. . . . . .

[fol. 50] Q. Now, you are familiar with the location of the Tallmadge store and the adjoining lots in the country there, are you?
A. Yes.
Q. Across the street from Ekers market in Tallmadge there is a strip at the side of the road that was used by a number of cars for your pickets, is that correct?
A. Yes. We received permission from the City of Tall-

madge to park a number of cars off the road, opposite, across the street from the Tallmadge store.

Q. Now, those cars and occupants were in addition to the pickets that you had just across the road, carrying the banners and picketing the entrances?

A. I don't know what additions they were. They might have been relief—they may have been there. The important thing is that I don't recall—unless a relief change was occurring—the relief coming up and taking the sign and two leaving—only at that time would there be more than two people at any of these—unless somebody stopped to talk to them.

Q. With reference to the driveways entering off of the highway into the place of business and the curb, where would these pickets be operating?

A. In reference to the distance from the curb?

. . . . . .

[fol. 51] The Court: Do you understand the question, Mr. Pollack?

The Witness: I think I do. They would operate within a six to eight foot radius of the curb, walking from the limits of the driveway—that is, not stay in one place—and the driveway—and the south driveway I think is about something like 50 to 60 foot wide, and the north driveway is about 35 to 40 feet wide.

. . . . . .

If there weren't sufficient pickets—that is, to man these [fol. 52] places—then the pickets would picket within the five foot devil-strip between the driveways and would not be in the driveway at all. We just didn't have the manpower.

. . . . . .

[fol. 53] Q. At each entrance?

A. At each entrance, except for the time when there weren't that many pickets, then they would walk this strip in here, within five feet of the curb, between here and there, and wouldn't be in the driveway.

The Court: On Plaintiff's Exhibit 3, the three pickets

that are standing are standing on the wider driveway of the two?

The Witness: No, it's the narrower driveway. That's why I would assume that a change in pickets was taking place at that time. This driveway is a very wide driveway.

• • • • • • •

[fol. 54] Q. You did observe as cars would come into the entrance the pickets would ask to talk to the drivers of the cars as they came across the drive, didn't they? You noticed that?

A. If the car stopped we would talk to them; if the car didn't stop we didn't talk to them.

Q. Well, the pickets were in a position many, many times every day that the driver of the car would have to run them down if they didn't stop, isn't that correct?

A. That is not correct. I was there——

Q. The pickets didn't yield the driveway to those who came in and out, but rather, they just kept walking across as they saw leisurely fit to do so. Isn't that correct?

A. While I was there and directly observed it, we always stepped out of the way of the car coming in. If they wanted to stop that was their business—we would talk to them. And if they didn't stop there wasn't any way we could stop them from going right on in.

Q. What did you say to them when they stopped?

A. We told them we were on strike.

Q. What else did you tell them?

A. Asked them to please respect our picket lines.

Q. What else did you tell them?

A. That was the substance of it.

[fol. 55] Q. Didn't you tell them, "Don't patronize this place." Didn't you use that exact expression?

A. I think we used the term: "Please don't patronize Ekers Meats. We are on strike." Words to that effect.

Q. How many pickets did you have out on West Market Street on the morning of February 4th?

A. Well, I wasn't there on the morning of February 4th. I believe there were two, from the information that I was given.

Q. Were either one of those people employees of Ekers at the Market Street store?

A. They were members of our organization.

Q. But not employees of Ekers?

A. I don't know, because I wasn't there on the morning of February 4th.

Q. How long did this picketing continue at these stores?

A. For the time that the store was open.

Q. From February 4th at 5 o'clock to what date in February?

A. Oh, I believe the date in February when the injunction restraining picketing at West Market and at Tallmadge was issued was February 11th.

Q. All right. Now, you stopped picketing on February 11th, is that correct? At these two stores.

A. That's right.

Q. Now, when did you resume picketing?

A. We resumed picketing I believe it was February 26th —around February 26th—I would have to look at the record to refresh my memory.

Q. Let me refresh your recollection on that. You filed your motion on February 26th.

A. Oh, we filed that on February 26th?

Q. To modify.

A. Then it would be the following day.

[fol. 56] Q. And on March 5th is when I have it that Judge Wanamaker told us he was without jurisdiction because the case had been removed by you defendants to the Federal Court. Do you recall that is approximately correct?

Mr. Riemer: We would so stipulate, your Honor. Those dates are approximately correct. Your Honor, however, is that any issue in this proceeding?

The Court: I do not feel that it is.

Mr. Denlinger: Your Honor, I want to show the conduct of these people as bearing upon their motive and the legality of their picketing.

The Court: You mean the conduct after Judge Wanamaker had issued a restraining order?

Mr. Denlinger: Yes, your Honor.

The Court: All right. Go ahead.

Q. Did you resume picketing on March 6th, you and Mr. Dougherty and the others?

A. If that is the date—if that date followed the day we were in Judge Wanamaker's court when he advised us that he no longer had jurisdiction in view of the fact of the action taken in Federal Court—we resumed picketing the following day.

Q. How long did that continue.

A. That continued until the day of the order of the Federal Court to remand back to the state courts.

Q. How many days was that, do you recall?

A. I think it was eighteen or nineteen days.

Q. During that time you picketed the same locations and in the same manner as you had begun on February the [fol. 57] 4th?

A. When we resumed picketing we resumed picketing with the employees who were on strike and members of our organization.

Q. Well, who were the employees on strike at the Tallmadge store that picketed prior to March the 6th—any of them.

A. I don't recall.

Q. Well, you wouldn't say there was any of them, would you?

A. No, I wouldn't say there wasn't any of them.

Q. Or that there was?

A. Or that there was. I wasn't there all the time.

. . . . . .

[fol. 58] Q. These other Unions did support you, didn't they?

A. I believe there was some support because members of organized labor did not cross our picket lines.

[fol. 59] Q. Tell the Court what support was given you.

A. I don't know precisely the support that was given us. All I can infer is that people, who identified themselves to me, when I was on the picket line, as being members of Labor, said, "O.K. You got a strike here; we won't cross your picket line."

Q. People told you that while you were on the picket line?

A. That's right.

• • • • • • • • •

Q. Don't you know, as a matter of fact, that teamsters refused to corss your picket lines to make deliveries?

A. I imagine there were some teamsters who refused to cross picket lines.

Q. And deliveries weren't being made, so that Mr. Ekers himself had to try to get deliveries made for his business; you know that, didn't you?

A. I assume that may have occurred.

• • • • • • • •

[fol. 60] Q. Let's go to the Market Street store. How long did the picketing continue there, on the basis you outlined of two of the pickets in the same manner and for the same purpose as out at Tallmadge?

A. The picketing at the West Market Street store, insofar as the starting of picketing and the ceasing of picketing, cessation of picketing and resumption of picketing, it was identical with that of Tallmadge.

• • • • • • • •

Mr. Riemer: Counsel for the defendant is willing to propose the following stipulation: that the picketing at West Market Street and Tallmadge ceased on or about February 11th, 1954, following the issuance of the temporary order by Judge Wanamaker, but was resumed on or about March 6th, 1954 at both West Market Street and Tallmadge, and continued thereafter at those locations until on or about March 25, 1954.

• • • • • • • •

[fol. 61] Now, the picketing at Richfield still continues, does it not?

A. Yes.

Q. And the picketing at Richfield has gone on since the same morning that the picketing started at the other two stores?

A. Yes.

Q. And would you describe to the Court the nature of the picketing at Richfield?

A. The nature of the picketing at Richfield is pretty much the nature of our picketing at West Market and at Tallmadge, and that is that in respect to the drivers, we might have two people out picketing and relief available.

The Court: Two people at each driveway?

The Witness: Well, there is—your Honor, at West Richfield you can drive on there—not through the driveway, but you can get over to where the parking lot—or parking right in front of the market—from about twenty different directions. I mean there are some driveways, but the curb is low and they go over it any place or anywhere.

The Court: And people were picketing there?

[fol. 62] The Witness: We would generally have—we would try to have—I'll put it that way—two at one end and two at the other end, but it didn't always hold up—sometimes picketing would go down to just two people for the entire stretch—sometimes just one.

* * * * * * *

The Court: Can we stipulate this: The picketing at Richfield is done in compliance and in conformity to Judge Wanamaker's order?

Mr. McGowan: Oh, no, your Honor. He authorized picketing but they have been picketing on Mr. Ekers' property at all times, because out in the County you own out to the road. They are on his lot every day. He didn't authorize them to picket on Ekers' lot, and they have been on Bert's lot out there in all their picketing, because we own to the curb.

* * * * * * *

But he did not authorize you to picket on Bert's property, and that's where you were picketing and have been at all times. There is no walk out there and he owns right to the road. They can't go up on a man's property and picket.

* * * * * * *

[fol. 63] The Court: I am not saying it was not illegal for them to trespass; it is. But I am wondering whether or not, further than that, that they deliberately violated Judge Wanamaker's order.

Mr. Denlinger: There was no order made against the folks at Richfield.

The Court: That is all I wanted to know.

* * * * * * *

[fol. 64] Q. What I am driving at is you have a general knowledge of the location and so on, that you can give the Court some description of where the place of business is located with reference to the highway and the conduct of the pickets in connection with that particular place of business. Will you tell us that in your own way?

A. I can try.

The Court: Is this Richfield *of* West Richfield?

The Witness: West Richfield.

Mr. Denlinger: At the intersection of 176 and 21.

A. The store sits back about 50 feet from the curb line of the highway. One driveway—that is, if we can call it a driveway, because the limits are not clearly marked—the socalled north driveway—that is north of the store—is almost at the intersection of 21 and 176, and possibly might be considered to be about 100 feet wide, that cars can egress over a hundred foot area—at least over at the north side of the store—that is north of the store. There is a driveway south of the store. Whether that is in line with Mr. Ekers' property or whether it is a joint [fol. 65] driveway used by a group of business houses—separate establishments—which are located just south of Mr. Ekers' buildings—there is a land gap between those two sets of buildings, and there are additional driveways which everybody uses. They use Mr. Ekers' driveway from north to get to the tavern, and use the tavern driveway on the south and drive up to Mr. Ekers' store.

The Court: Is this on the southeast corner?

The Witness: It is on the south side of the store. The store is on the east side of the highway, route 21.

The Court: It would be the southeast corner of the intersection?

The Witness: Yes, southeast of the intersection so it is possible for cars—and the way they drive they use that entire fifty feet both for driving, parking and walking. People coming across the highway to go to the tavern will cross the intersection with the light and then walk right along where the cars generally drive to get to the place, and use that as a walk. There is no walk as such, it is just plain dirt—it is not not paved or black-topped or anything like that—it is just dirt. And the curb isn't very distinct there. It is a main highway and the didn't put up a curb like they would ordinarily do in a residence. And our people generally walked somewhere in this driveway or in front of the store, but it's still about fifty feet away from it—within the so-called 6 or 8 foot distance from what would be the curb line on whose ever property that might be. And, generally speaking, it has been my obser-
[fol. 66] vation any time I have been out there, I haven't seen more than two people covering that whole stretch, picketing at the same time. There have been others who have been there for relief purposes—they might either sit in a car which is parked off the highway or they may be up in the tavern—but we prefer them not to go in there——

The Court: But, in any event, they were parked on Ekers' property?

The Witness: I don't know whether they were parked on Ekers' property. This is the first we have been notified—first we have ever heard that this is Ekers' property. I know it has been our policy that whatever law authorities that would police that area—that we could talk to and find out, you know—just how we could dispose our pickets without being in violation of any particular ordinance that might apply—but we weren't able to find anybody to talk to there except the State police; and the Sheriff's officers came by there every day and have had no occassion to warn us or to order us off that property at any time.

* * * * * * *

[fol. 67] Q. Mr. Pollock, between Highway 21 and the locker at West Richfield there is a light pole or telephone pole there. Do you recall?

A. Yes.

Q. Your strikers have been parking a car right beside that pole.

A. Between the pole and the curb.

Q. Between the pole and the curb,——

A. Yes, that is right.

Q. And between the curb and Mr. Ekers' place of business, right?

A. Between the curb and that pole.

Q. All right. And that you have been carrying a sign on that automobile, a sign "On Strike" on both ends of it, haven't you?

A. I have been there and seen the strike sign on both ends of the car.

Q. That automobile is parked there constantly, all day long, with that sign?

A. Whoever is picketing generally has their car parked there.

* * * * * * *

[fol. 68] Q. This car is parked in front of Mr. Ekers' place then, you say?

A. Yes, it is substantially in front of Mr. Ekers' place, between the pole and curb.

* * * * * * *

Q. The pickets leave the car and march up in front of Mr. Ekers' place at the two entrances that you have described?

A. The pickets generally picket further down where there is a highway—that is a drive—picket further down. But generally somewhere between the pole and the curb.

Q. Yes, and at a spot where vehicles customarily come in and out to go to Ekers' place.

A. There's not any spot on that property you can stand [fol. 69] where vehicles don't come in and out—not one spot.

Q. So you marched back and forth approximately how many feet in doing your protesting here?

A. I wouldn't know how many feet they marched up and down, but generally we wanted them to walk—keep walking, you know. It might be a distance of 200 or 300 feet

to try to cover that area. I mean two people. Generally, that's about all that have ever picketed at one time so far as—there have been times when we had them on the other side, you know—another driveway. But generally speaking, only two.

• • • • • • •

Q. Ever ask Mr. Ekers for permission to park this car and do that work you are doing out there?

A. We never asked permission of Mr. Ekers to park our car there.

Q. That car isn't parked there as a customer of Mr. Ekers?

Mr. Riemer: Which car?

A. With that sign on it?

Q. Yes.

A. No. That's one of the picket's cars—one of the strikers.

• • • • • • •

[fol. 70] Q. You don't know whom it belongs to, do you?

A. No.

• • • • • • •

The Court: And you have made no investigation to ascertain whose property it is?

A. No.

Q. Do you know a Thomas Tandarich?

A. Yes.

Q. Is he one of the picketers?

A. He is a member of our Union on strike and picketing.

Q. Do you know where *is* is now working?

A. I didn't know that he was working.

Q. Do you know that he had resigned his position at Ekers?

A. No, I didn't know that he had resigned.

• • • • • • •

[fol. 71] Q. Do you know Donald Herbruck?

A. Yes.

Q. Is he a member of your Union?
A. Yes, he signed an application.
Q. Is he a striker?
A. He is on strike.
Q. Is he a picket?
A. I don't know.
Q. Do you know that he resigned his job at Ekers?
A. I think I heard him say that he had signed a paper before he came out, but what that paper is or what he signed I never saw.
Q. Before he came out?
A. He told me he signed a paper before he came out.
Q. When did he come out?
[fol. 72] A. I don't recall the exact date.
Q. Was it before March 6th?
A. It could be.
Q. Do you know Walter Carpenter?
A. Personally, no.
Q. Is he a member of your Union?
A. Yes.
Q. Is he a picketer?
A. Not to my knowledge.
Q. Was he formerly employed at Mr. Ekers?
A. I saw his name on Mr. Ekers' payroll.
Q. Do you know that he resigned as an employe of Ekers?
A. No.
Q. Do you know Mr. S. P. Speece?
A. No.
Q. Do you know the gentleman?
A. Not personally.
Q. Do you know whether or not he is picketing?
A. Not to my knowledge.
Q. Is he a member of your Union?
A. To my knowledge he has signed an application authorizing the Union to bargain for him.
Q. Do you know that he has resigned from his job at Ekers?
A. No, I didn't know that. I have no knowledge of it.
Q. Have you ever conferred with these people—Speece, Tandarich, Carpenter, Herbruck—since you resumed picketing?

A. Yes, I have conferred with Tandarich and Herbruck, those two.

Q. Those two told you they had resigned from their jobs, didn't they?

A. They told me they signed some sort of a paper that they were asked to sign. I never saw the paper, I never had an accurate description given.

Q. Do you know Tandarich's signature when you see [fol. 73] it?

A. No, I wouldn't know his signature if I saw it.

* * * * * * *

THOMAS TANDARICH, called by the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Denlinger:

* * * * * * *

[fol. 74] Q. Where have you been working?

A. Eckers Packinghouse Market.

* * * * * * *

Q. I will hand you what has been marked for identification as Plaintiff's Exhibit 5. Is that your handwriting?

A. Yes, sir, it is.

Q. Did you read that before you signed?

A. Uh huh.

Q. What did you intend to do upon signing that? To resign your job there? Is that what you intended to do?

A. Yes, sir.

Q. All right. These two men whose names are mentioned there, were they present when you signed it?

A. Yes, they were.

Q. You are no longer employed by Ekers, are you?

A. No.

* * * * * * *

[fol. 75] JAMES DOUGHERTY, called by the plaintiff, being first duly sworn, testified as follows:

Cross-examination.

By Mr. Denlinger:

. . . . . .

Q. What is your business, Mr. Dougherty?
A. Business agent Local No. 427.

. . . . . .

[fol. 76] Q. I want to direct your attention to your business card, which is part of the exhibit known as Plaintiff's Exhibit 2-A and 2-B, and that is the business card which you have been using since you became business agent in June, 1953, is that correct?

A. That is right.

Q. Now, will you examine the two sheets representing Exhibit 2-A and those of 2-B and tell the Court if you recognize what this particular exhibit represented.

A. Exhibit 2-B is a typical contract for the retail field in the Akron area which was negotiated in June—or rather, September, 1952. And Exhibit 2-A is the result of the wage re-opener we had in 1953.

Q. Now, will you tell the Court if you have seen this particular exhibit before, and if you are the gentleman that left them with Mr. Ekers for his consideration?

[fol. 77] A. Yes, I did.

Q. Do you recall approximately when you did that, as near as your memory will serve you.

A. I would say the latter part of August or early September.

. . . . . .

the first time I was in Ekers' establishment Mr. Ekers wasn't there.

. . . . . .

[fol. 78] Some three or four weeks after that I stopped in the Ekers establishment in Tallmadge, and at that time I met Mr. Ekers for the first time.

. . . . . .

Q. Didn't talk about the contract any more than you reminded him that it had been left for him to consider, is that right?

A. Right.

Q. At that time, Mr. Dougherty, how many members did you have in your Union—of employees of Ekers.

A. Those records were not at my disposal. I knew there were some members of our- working for Ekers.

Q. Do you know how many?

A. Off hand I couldn't tell you exactly.

Q. Could you give any idea?

A. These two girls I mentioned were members. And there were at that particular visit—we were talking about my first visit—there were, I believe, four on duty at that [fol. 79] time.

Q. Do you know how many employees he had all together?

A. I didn't.

Q. Do you know whether at any time since you first talked to them, your Union represented by way of actual membership in your Union, or by way of authorizations, a majority of the employees?

A. The only time I really had any idea how many members of ours were in there was at our hearing before Judge Wanamaker.

Q. And prior to that time you had never ascertained what your membership was?

A. Exactly how many there were, no, sir.

. . . . . .

[fol. 80] Q. Do you know what is his scale of pay there?

A. Completely, no, sir, I don't.

. . . . . .

Q. Did you have, as business agent, a signed complaint from a single employee regarding Mr. Ekers' employment?

A. Oh, yes, I did——

. . . . . .

Q. From whom?

A. Well, from at least one I do recall.

Q. Who was it, this one that you recall?

A. Well, when you go into stores you do hear rumblings now and again of dissatisfaction.

Q. So this was on an occasion when you visited one of the stores, is that right?

A. Yes, it was.

Q. Do you remember what store it was?

A. It was in Tallmadge.

Q. Do you remember who the person was?

A. No, sir, I don't.

Q. Did she give you her name?

A. Let me see if I can recall—on one and another——

Q. Maybe it will help you. Let me ask you this: Did [fol. 81] you make a grievance out of that conversation—prepare any grievance or at any time take up with Mr. Ekers this complaint that you are telling us about?

A. No, sir.

. . . . . .

Q. What were the terms of the contract?

[fol. 82] A. Exhibit 2-A and 2-B.

Q. That was the contract your Union was insisting upon. Is that the contract?

A. That is the general contract throughout the area, yes, sir.

Q. That is the contract that all employers sign, is that right?

A. Yes, sir.

Q. So that we might very properly say to this Court, so far as your Union is concerned, that is the contract, or otherwise your Union don't agree upon a contract. Isn't that correct?

A. Well, sir, don't forget, he was my first effort, and whether there was going to be any modifications of that contract I couldn't definitely answer yes or no.

Q. What I am trying to find out is this, Mr. Dougherty, Exhibit 2-B is the standard contract for your Union?

A. Yes, sir.

Q. Which you negotiate with all employers, with only slight modifications with any particular employer, is that correct?

A. Generally speaking, yes.

Q. In other words, by virtue of this kind of agreement you attempt, as far as possible, to standardize the rates and hours and all of the conditions for all employers, in accordance with 2-B. Right?

A. True.

Q. Now, among those requirements is the Union shop, is that correct?

A. That is one of the requirements, yes, sir.

Q Will you tell the Court whether or not you have a conversation with Mr. Ekers at any time in which the subject of his employees belonging to the Union, or not belonging, was discussed?

A. Yes, I believe it was discussed at one of the Cleveland [fol. 83] meetings. Mr. Ekers made the statement that he would be there, he was worried because if he did sign that contract he may lose some of his personnel.

Q. And what did you and Mr. Pollock say, if anything, about that?

A. As I recall, Mr. Pollock's answer was just this: that they have been presented with a problem like that before on initial contracts with a new employer, and his statement was just this: "We have yet to see an employer lose a man." That was it.

Q. "We have yet to see an employer lose a man".

A. Right.

Q. In other words, when once an employer signed this kind of an agreement with the standard union shop clause in it, the practice, from your experience, is that everybody that has not been members of the Union becomes members of the Union. Is that your practice?

A. Yes.

Q. I mean, not your practice but your experience?

A. Yes.

* * * * * * *

[fol. 84] Q. How many employees of Mr. Ekers would you say were present at this meeting?

A. I don't know, sir.

Q. Did you see any of them?

A. We have had Ekers' employees at meetings, but

whether there were any at that particular meeting or not, sir, I couldn't say.

Q. Directing your attention to that particular meeting, and without going into the various items of business that your membership may have conducted on that occasion, will you tell this Court whether or not at that time a strike was authorized by the officers at Ekers' place of business?

A. To answer you simply and briefly: yes.

. . . . . .

[fol. 85] Q. No. I'm sorry—The meeting was February 2nd, you stated. Meeting the 2nd, meeting night of your Union. On the 3rd you and Mr. Pollock met Mr. Ekers at the office of the Union in Cleveland. Is that correct?

A. Right.

Q. Can you tell us what was said on that occasion by the parties who conferred at that time?

A. Yes. Of course, you might say a continuation of our efforts to get Mr. Ekers to recognize us as the sole bargaining agent of his employees. And Mr. Ekers knew that we had met and met and met again, and we still hadn't culminated anything at all. And as I do recall, Mr. Ekers said definitely that he did not want to negotiate a contract right now.

. . . . . .

[fol. 86] Q. What did he say on that occasion regarding his employees not wanting to join the Union?

A. Much the same as was said just a moment ago. He talked about these people who didn't want to join the Union and he felt that he might lose them.

Q. So it was on various—more than one occasion and prior to February 3rd, that he did advise you, as business agent for this Union, that the union shop clause was giving him difficulty in arriving at what he should do toward your negotiation, is that right? That that subject was bothering him as to how to handle it?

A. It may have been bothering him, sir, but I don't think it was his main worry.

Q. What I am trying to have you tell us, if it happened, is that that subject was discussed and brought to your

attention on more than the one occasion prior to February 4th?

A. Yes. The conversation on that, sir, only took just a few seconds to start and complete.

. . . . . .

[fol. 87] Q. Did he at any time offer you any opposition whatsoever to discuss with his employees, on company time and company property, the opportunity of joining the Union?

A. No, sir.

Q. He gave you free access to his employees for that purpose?

A. Uh huh.

Q. Will you tell me, or tell the Court, with that opportunity and access to the employees at their place of work, how many employees you signed up of Mr. Ekers for membership in your Union?

A. West Tallmadge, we signed up nearly all the employees at the West Tallmadge store—I'm wrong; excuse me—West Richfield.

Q. How many is that?

A. Off hand I would say five or six.

Q. Five or six at West Richfield?

A. Right.

Q. How many signed up at West Market?

A. West Market I had signed up three.

Q. You have their cards?

A. Oh, yes, sir.

Q. Are they now out on strike?

A. No, sir.

Q. Are they back to work at Ekers?

A. Yes, sir.

Q. So everybody at West Market Street, or all who worked there, the three who signed up for membership are not now on strike but still employed by Ekers?

A. Right.

Q. What did your efforts result in at Tallmadge?

A. I signed up a number.

Q. How many at Tallmadge?

A. One day in particular I signed up four. How many

[fol. 88] were members I don't know, all together, as I said before.

Q. So, all in all, you signed up five or six, we'll say, at West Richfield; three, was it, at West Market?

A. West Market.

Q. That's nine. And four or five at Tallmadge?

A. Tallmadge, right.

Q. Making a total of fourteen. Is that correct?

A. That's not counting the members who Mr. Ekers had already employed who were already members.

Q. You didn't have any paid-up members at any of these stores at the time you began this, did you?—When you talk about members at Ekers, you are telling the Court at one time or other in the life of these particular people, working for a certain employer, they had joined the Union. Isn't that what you mean?

A. Right.

Q. You didn't have a signed-up member at Ekers at the time this strike started, did you?

A. That I have no way of knowing, sir. I am not the secretary-treasurer. But I might answer that in this way: Ekers' employees had attended meetings after I had become business agent.

Q. You never at any time considered you had as members of your Union a majority of Ekers' employees, did you?

Mr. Riemer: I object to that.

The Court: He may answer if he knows. Do you know how many employees Ekers had?

A. No, sir, I don't.

[fol. 89] The Court: Sustain the objection.

Q. Now, you started picketing at these various stores on the 4th of February this year—I think is the date we have already agreed upon here.

A. Right.

Q. Did you join that picketing that morning?

A. Yes, I did.

. . . . . .

Q. Would you say around five o'clock in the morning?

A. About that; yes, sir.

Q. Do you know what time the store opens?

A. The store opens, I believe, around eight—eight-thirty.

Q. What was the purpose of you going to picket Tallmadge at five o'clock in the morning?

A. Some of Mr. Ekers' employees get there, we understook prior to the strike, before five o'clock in the morning.

Q. Also deliveries are made before the store opens in the morning, are they not?

A. Well, primarily our reasons was the men, that I had talked to just the night before, was going to work that morning around five o'clock.

Q. Were you going out there to meet these men or to keep them from going to work?

A. To ask for their support.

Q. You were going there to ask them not to go to work, weren't you?

A. To ask for their support.

Q. By "support" you mean you didn't want them to go to work?

A. Yes.

• • • • • • •

[fol. 90] Q. Now, will you tell the Court generally the places around the Tallmadge store and vicinity in which you saw the pickets operate, as they picketed from the 4th day of February to approximately including the 11th of February—tell us the vicinity and what they did in this general way at Tallmadge.

A. Well, when we had enough pickets, the usual pro-

[fol. 91] cedure was two pickets at each entrance.

Q. Yes?

A. And they were relieved either once every hour or once every half hour, depending on the weather. When the pickets were few, we only had two or three pickets, we would put one picket on line and that one picket would walk in the five or six foot stretch between the street and the area we had assigned to us—from one driveway to the other.

Q. How about the driveways themselves? Didn't you——

A. Driveways themselves when the pickets were very,

very few—only one pick ' started at one driveway, walked to the other one—some 300 feet—and back again.

Q. Didn't you, as a rule, have two pickets walking back and forth across the driveway?

A. When we had ample pickets there that was the procedure, yes.

Q. And how far from the curb line of Tallmadge Avenue, or the street line—I am talking about now where the street comes up to the edge of the dirt—how far from that curb line was this imaginary line known as the picket line—was the picket line drawn that was traversed by the pickets? How far back from the street line?

I would say 6—7 to 8 feet. I would say about 7 feet, possibly.

Q. That would be 7 feet from the street in the direction of Ekers' store itself?

A. Right.

. . . . . .

Q. Listen to my question, Mr. Dougherty. Do you know whose property you were picketing on?

A. No.

[fol. 92] HARVEY EKERS, called by the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Denlinger:

. . . . . .

Q. How long have you lived in this County?

A. Summit County approximately thirty years.

Q. And during those thirty years in what occupation have you been engaged?

A. Meat business?

. . . . . .

Q. You are presently engaged in what business?

A. Meat business.

Q. And do you carry your operations through a corporation?

A. Yes, sir.

Q. And what is the name of that corporation and where [fol. 93] was it organized?

A. Fairlawn Meats, Incorporated. Organized in Akron, and an Ohio corporation.

Q. Who are its sole stockholders?

A. Nina Ekers and Harvey Ekers.

Q. That is your wife and you?

A. That's right.

Q. Now, tell the Court where you maintain your stores.

A. One store at 278 West Avenue, Tallmadge, and the other one at 2246 West Market Street, and the other one in West Richfield, intersection of routes 21 and 176.

Q. Do those three stores make up the total operations of your company?

A. They do.

Q. Now, chronologically—as to time—when were those stores opened?

A. The West Market store was opened about the first of March, 1951, the Tallmadge store was opened the first of March, 1952, and the West Richfield store was taken over about the first of October, 1953.

Q. Now, taking those stores up in the reverse order that you have mentioned, will you tell the Court whether or not you are the owner or the lessee of the West Richfield store?

A. West Richfield, a corporation is the owner.

Q. That has been purchased outright by the company?

A. Yes, sir.

Q. And is titled in the company and operated by the company?

A. Yes, sir.

Q. What kind of business is customarily done at the West Richfield store?

A. 90 Per cent of the business, approximately, is meat business.

Q. Do you have any other operation there except the [fol. 94] sale of meats?

A. There's locker storage facilities.

Q. So that this building houses a locker storage facility as well as the retail sale of meats?

A. Yes, sir.

Q. Do you do any wholesaling of meats out of West Richfield?

A. I would say that less than 5 per cent of our business at West Richfield is wholesale.

Q. Now, coming to the store on West Market Street, which I believe is located in the building in which Sparkle Market conducted a grocery store, and is approximately at the intersection of West Market Street and Sand Run Road, is it?

A. That's right.

Q. Tell us what is the nature of your business there.

A. One *H*undred per cent meat and allied items, such as frozen fish, because we are leasing in a store where there's groceries—in a super-market. And—pardon me, does that answer your question?

Q. Let me go one step further. You have properly answered it, I think. I want to ask you, do you have—your corporation have—any interest in the real estate at West Market Street?

A. No, sir.

Q. Other than leasing the space in the super-market building?

A. Yes, sir, that is true.

Q. That is the limitation of your interest in the real estate?

A. Yes, sir.

Q. Now let me go back a moment to West Richfield. How many do you normally employ, and how many were you employing, at West Richfield in the operation of that store on the 4th of February, 1954?

[fol. 95] A. There were, I'm pretty sure, seven persons employed.

Q. Seven at West Richfield. These figures we will get exactly from your bookkeeper later.

A. That's right.

Q. Now directing your attention to the West Market reet store, how many were employed there?

A. I might say, going back to Richfield, if I may, on Saturday I would have an extra person, that would make eight employed at West Richfield.

Q. And at West Market Street?

A. At West Market Street we would have approximately

four full-time—five full-time help and two or three part-time—that means less than fifteen hours a week.

Q. Directing your attention now to the Tallmadge, Ohio, store. Is that real estate and building leased by you, or your corporation, or owned by it?

A. It is leased.

Q. And how long a lease do you have for it?

A. I have at the present time a one year lease starting March 1st, with an option of one year.

Q. How many people do you normally employ at Tallmadge?

A. When you say "normally", I would say at the time this trouble developed——

Q. That's a good time to fix it.

A. I would say I had between—around between thirty to thirty-five.

Q. I neglected to ask you the nature of your sales at West Market Street. Are they largely retail, or what is the nature of that business?

A. Ninety-five per cent of them, approximately, would be retail.

Q. When you say wholesale—or sales other than retail—tell to the Court what that 5 per cent of sales represents, [fol. 96] as to the kind of transactions and the people to whom you are selling.

A. It would be restaurant business.

Q. The restaurant business?

A. Yes, sir.

Q. You do not wholesale in the sense of selling meat or any provisions to some other retailer for retail sale to the consumer?

A. Not at West Market Street.

Q. Nor at West Richfield?

A. No, sir.

Q. Now, directing your attention to the business conducted at Tallmadge, will you tell the Court the nature of that business, as to retail sales and other types of sales.

A. There, for one thing, we have a locker plant with a locker capacity of about double the Richfield plant. I do not have the exact figures, but I would say between 60 and 70 per cent of our business would be retail, and be-

tween 30 and 40 per cent wholesale. And when I say "wholesale", principally restaurants.

Q. Out of Tallmadge do you sell to any retailer who purchases from you for the purpose of retailing or making sales over the counter, as you make them over the counter?

A. We do a little bit. We used to do more.

Q. But now the percentage is how small, would you say?

A. I would say our sales of that kind would possibly be about ten per cent.

Q. The balance would be to restaurants and to the consumer across the counter?

A. Yes, sir.

Q. Now, I think in going into the operation of your business the Court might be interested in from whom you [fol. 97] make your purchases. And I would like for you to tell the Court from whom your principal purchases are made.

A. I would say that pretty nearly—approximately between 40 to 50 per cent of my purchases in the last fiscal year were from two Cleveland packers—two large Cleveland packers. The others were——

Q. Now, that is with reference to your meat purchases?

A. Yes.

Q. Now, you purchase fish and fowl and all of that stuff?

A. From maybe 50 different suppliers—wherever we can buy it.

Q. Where are those suppliers located? In what states?

A. Ohio.

Q. You made some purchases that are shipped from outside of Ohio into Ohio, don't you?

A. Yes, sir.

Q. I want you to tell the Court where those representatives of those companies live and maintain their offices.

A. I would say that possibly around 10 per cent of our—10 or 15 per cent of our purchases would be made from concerns outside of the state. And when I say outside of the state—their representatives would have local representatives that call on us, as far as us buying direct——

Q. Tell the Court how those purchases were made and where made and how they're handled and how paid.

A. Salesmen call on out and salesmen collect for it.

Q. Do you know, from checking your bank account, where the checks for these purchases for shipments outside of the state—where they are deposited?

[fol. 98] A. In Akron in local banks——

Q. In local banks in the name of these particular shippers, is that right?

A. That is right.

Q. How much are your total sales a year—or purchases?

A. Purchases or sales?

Q. Let's put it purchases.

A. I would say between three-quarters of a million and a million dollars.

Q. $750,000.00 to $1,000,000.00?

A. Yes, sir.

Q. And you will say to this Court that not to exceed $750,000.00—or excuse me—not to exced 10 to 15 per cent of those total purchases are made outside the State of Ohio, in the respect of being shipped from outside of the state, although purchased within the state?

A. I would say 15 per cent would cover it, yes.

* * * * * * *

Q. Will you state to the Court whether or not at any time in the last three years, or since the incorporation of your company and the beginning of your operations as Fairlawn Meats, Incorporated, have you at any time had a single dispute or controversy with any employee that you have had, regarding their wages, their hours or other conditions of employment?

A. Well, I have had differences of opinion in one or two cases over those three years, and as a result in possibly one case the party left my employ and went to somebody else's employ. And we are the best—in both those cases that I can think of—we are on the best of relations—[fol. 99] they felt they could do better elsewhere, and they went.

Q. Have you at any time since the inception of this company ever been requested by any business agent or Union representative to handle a grievance for any employee in your employment?

A. No, sir.

Q. Did you on the 4th of February have a dispute of any kind regarding wages, hours or conditions with any employee of yours at that time?

A. No, sir.

Q. Did any employee or business agent on the 4th of February, 1954, or immediately prior thereto, complain to you about any grievance of any kind regarding their employment?

A. No, sir.

Q. Now directing your attention to the 3rd of February, 1954, did you meet in the office of the defendant Union in Cleveland and have a conversation with Mr. Pollock and Mr. Dougherty?

A. Yes, sir.

Q. You have heard both of these gentlemen testify regarding that conversation?

A. Yes, sir.

Q. You heard their testimony. I want to ask you whether or not you recall of having brought to the attention of Mr. Dougherty and Mr. Pollock—and previously to Mr. Dougherty's attention—that you feared difficulty in retaining your employees because of the union shop clause of the contract?

A. Yes, sir.

Q. You told them that?

A. Yes, sir.

Q. And what is the fact, had you discussed with your employees whether or not they wished to join the Butchers [fol. 100] Union?

A. I don't know just how to answer that question. The question that did come up was the question of whether they wanted me to sign a Union contract——

Q. Whether the employees wanted you to sign a Union contract?

A. —which would force them to belong to the Union.

Q. Did you ask them that question?

A. Yes.

Q. What did they tell you they wanted you to do?

A. I never had one employee tell me they wanted me to sign such a contract.

Q. Not a single one?

A. Not a single employee.

Q. Now directing your attention to the 4th of February, 1954—that is when the picketing began at your various stores, is that correct?

A. Yes, sir.

Q. Now, what was the result of that picketing with reference to your being able to get deliveries at your stores through the picket lines of the normal truck deliveries?

A. Ninety per cent or more of the deliveries were stopped. Any delivery, I suppose, that had Union drivers wouldn't go through the picket line.

Q. What did you have to do in order to maintain the supply of merchandise for your stores?

A. I went and picked up the meat—either I or my employees had to go and haul the meat and other supplies in ourselves.

Q. And you did cross the picket line, of course?

A. Yes, sir.

Q. I want you to tell the Court your experience coming from Cleveland, and other places, in acquiring the mer- [fol. 101] chandise with which to do business. What happened to you with reference to your use of the highways?

* * * * * * *

Q. Take the Cleveland incident, when the police gave you escort there. Tell the time and details of that transaction.

A. I can't tell the date.

Q. What month was it? Was it before——

A. It was after the picketing had resumed.

Q. After the picketing had resumed?

A. Yes.

Q. So that it would be sometime after the 6th of March?

A. Yes, sir.

Q. And during the month of March?

A. Yes, sir.

Q. All right, go ahead and tell us with reference to that.

A. I went in to Swift & Company, I drove in there and there were two Union agents on the dock. I was told that

they were making an effort to keep me from getting supplies.

Mr. Riemer: Will you identify the Union agents?

The Witness: Mr. Samino and Mr. DeSantis. When I found——

Q. Were they employees of Swift & Company?

A. No, sir.

Q. They were business agents of this Union that you had previously become acquainted with in their efforts to get you to sign this contract?

A. Yes, sir. When I found this out I went upstairs to the sales manager of Swift & Company and told him what I thought was going on. He says, "We won't go for anything like that. That's collateral boycotting." That's the [fol. 102] statement he made to me. And I have since continued to get merchandise from Swift & Company.

Q. Just what happened when you left?

A. I left from there——

Q. What route did you take?

A. It's only about one block from Swift & Company to my next stop at the Peerless Packing Company. I pulled up to the dock and the two Union agents pulled up—they weren't fifty feet away from me.

Q. Before you go any further, are these two gentlemen in the meat business?

A. No, sir. They're Union agents.

Q. Go on.

A. I left my truck sit there and went into the Peerless cooler and came back out, and found my rear tire flat.

Mr. Riemer: It may be interesting that the tire was flat, but unless it is by the defendants——

The Court: It is a circumstance for the Court's consideration. Circumstantial evidence in this case is as applicable as in any other. Go ahead.

The Witness: Might I mention at this time that I hadn't got back from Cleveland an hour before I had another flat tire.

Q. What happened on the way home?

A. When I left Peerless—which I wasn't able to buy any meat from Peerless, they said the Union had prevailed on

them not to sell me and they wouldn't even let me haul it. I was followed for about five miles by these same two Union agents. At the corner of Brookpart Road and Broadview Road in Cleveland there was a traffic policeman directing [fol. 103] traffic. I pulled up where he was, and the two Union agents trailing me had to go around me. I told the policeman the situation. He said there wasn't too much he could do. He said when I get back to Akron I should notify the Akron police. I took the trouble to get the policeman's badge number and also the license number of the car trailing me.

Q. But the two occupants of that car you positively identify in this court as DeSantis——

A. And Samino. And following this little episode in Cleveland, when they passed me they had to turn on a side road. I was able, when I had the light, to go down Brookpark Road and elude them. I saw nothing more of them.

Q. Is this the only occasion you met with this kind of experience, being tailed?

A. No, sir. I was followed lots of times but was usually able to throw them off in a short time.

Q. How about going to and from your home to your place of business?

A. They never followed me from my home to my place of business.

Q. It was getting the merchandise to the store?

A. Yes.

* * * * * * *

[fol. 104] Q. The Peerless Packers is the one place you have just outlined, where DeSantis and the other business agent were present, that they refused to even sell you meat for delivery which you would haul away to your place?

A. That's right.

Q. What other packer has given you the same kind of treatment?

A. Earl C. Gibbs, Incorporated.

Q. And how long did the situation continue there with Mr. Gibbs that he wouldn't sell you any merchandise?

A. Up until about ten days ago.

Q. And is it from these two packers that you purchase

normally the greater portion of the meat of that class for sale in your business?

A. Our purchases were probably around the three-quarter million mark from Peerless, about 180 thousand to 190 thousand from Peerless, and 235 thousand from Earl C. Gibbs our last fiscal year. Those are the approximate figures.

. . . . . .

[fol. 105] Q. Let me take you back, Bert, to the property at West Richfield for a moment. How much frontage do you have in that location?

A. 200 feet.

Q. That is property that is wholly owned by the Company?

A. That's right.

Q. The frontage is 200 feet on Route 21, abutting Route 21?

A. Well, the two come together—21 and 176. It's on both roads.

Q. And on that 200 feet frontage there has been erected a block and cement house, is it, or storeroom?

A. Yes.

Q. The West Richfield location is in what county?

A. Summit.

Q. Is it in any incorporated village or is it out in the county?

A. It's in the county, I understand.

[fol. 106] Q. Well, there's not any question—there is no village there, is there? There is no incorporation?

The Court: Richfield Township, isn't it? Part of it is Richfield Township?

Mr. Denlinger: Yes.

The Witness: Yes.

Q. Do you know where the picketing has been going on at West Richfield with reference to this 200 feet or property fronting on——

A. Yes, sir.

Q. Tell the Court where that picketing is.

A. I have been there numerous times and the pickefing usually is anywhere from 10 -15 feet from the——

Q. Curb?

A.—curb, from the edge of the pavement.

Q. On whose property is that being done?

A. Our property.

Q. On your property. Have you noticed this parked car out there, with the picket signs in the front of the car and the back, parked there all day long?

A. That car, or cars, with these signs on have been there for a period of six or eight weeks.

Q. On whose property is that car parked every day?

A. On ours.

Q. Are the occupants of that car customers of yours that they park there all day long for the purpose of buying anything?

A. Not that I know of.

Q. Did they ever buy anything to your knowledge?

A. Not that I know of.

Q. Directing your attention to the Tallmadge, Ohio, store, will you tell the Court how much frontage there is [fol. 107] on that leased property?

A. About 285 feet.

Q. About 285 feet, and tell the Court on whose property the picketing has been going on there

A. Our property.

Q. On your property—property you lease?

A. That's right.

Q. They aren't picketing in the highway?

A. No, sir.

Q. How many feet from the curb are they picketing, normally?

A. I have seen them picket anywhere from 3 feet to 20 feet.

Q. 20 feet towards the store from the road?

A. Yes, 20 or 25 feet.

Q. Now, did you ever tell them to get off of either one of these properties?

A. I told them to get off the morning of the strike. I was the one that opened up the store the morning of the strike and told them to get off. I haven't talked to them since this.

Q. That was the morning of February 4th. You told the

pickets, including Mr. Dougherty, who was on the stand, did you not, to get off your property?

A. I told all the pickets who were there—and there was a tremendous amount of them——

Q. How many were there?

A. Oh, the first morning, 20 or 25—I don't know whether you would call them pickets, but they had 20 or 25 people on the property at the time I drove up to open the store.

* * * * * * *

[fol. 108] Q. With reference to the West Richfield property, when did you tell these people to get off?

A. I had no conversation with them there.

Q. You at no time have told the West Richfield pickets to get off?

A. No. I had one incident when I was talking to one their—May I amend that answer? There was one incident when I was talking to one of their members and one of their business agents came up, and I told him he was trespassing on our property. He said he didn't care, he represented the man I was talking to.

Q. Who was that agent?

A. Mr. Kabor—Koeber. These folks know who I mean.

* * * * * * *

Q. Who was the man you were talking to?

[fol. 109] A. Delbert Brown.

Q. Who is he?

A. He is the man that the attorney here said is the captain of their pickets there, but he lives up above our property.

Q. He lives in your house there?

A. Yes, sir.

Q. Wait! Do I understand, Bert, that the captain of the pickets, that are picketing your West Richfield store, lives in the apartment above the store at West Richfield?

A. That's right.

* * * * * * *

[fol. 110] HARVEY EKERS, called for continued examination, having been heretofore duly sworn, testified as follows:

Cross-examination.

By Mr. Riemer:

Q. Mr. Ekers, will you tell us when Fairlawn Meats, Inc., was incorporated?

A. Around within a month or two of January 1st, 1950.

Q. Now, as of the time that the strike started on February 4th, 1954, the corporation owned the property at West Richfield, did it not?

A. Yes, sir.

Q. And you leased the property at Tallmadge?

A. Yes, sir.

Q. And you leased space in the Sparkle Market on West Market Street?

A. Yes, sir.

Q. What space did you lease in the market—that is, the Sparkle Marklet, on West Market Street?

A. We leased a space between 25 and 30 feet wide on the east side of the room.

. . . . . .

[fol. 111] Q. Of course, your customers and patrons have the right to use parking space in the area which is outside of the store and runs from the store to the curb line?

A. Yes.

Q. And is it not also a fact that on West Market Street pedestrians customarily—traffic up and down West Market Street—passed the Sparkle Market?

A. Well, very few.

. . . . . .

Mr. Riemer: Are you raising any issue about trespass at West Market Street, Mr. Denlinger?

Mr. Denlinger: No, we are not.

. . . . . .

Q. Now, coming down to Tallmadge, that is property that the plaintiff corporation owns, is that a fact?

Mr. McGowan: Leased, he said.

Q. At Tallmadge you leased?
A. That's what I said.
Q. What property is covered by your lease?
A. My understanding, it goes to the center of the road.

. . . . . .

[fol. 112] Q. Now then, on that property is there a curb?
A. No, sir.

. . . . . .

Q. Now, Mr. Ekers, this photograph, Plaintiff's Exhibit 3, would seem to indicate—at least to me—that there is no established sidewalk.
A. That's right.
Q. In the sense that you have a gravel or concrete pavement.
A. Yes, sir.
Q. Do you know from your own observation and knowl-
[fol. 113] edge where pedestrians walk along Tallmadge when they traffic up and down there?

. . . . . .

A. The very few pedestrians that there are usually walk on the—on our strip just inside the street—just off of the pavement.
Q. That would be in this area shown in Plaintiff's Exhibit 3?
A. Yes, sir.
Q. Just at the or off the curb line?
A. Yes, sir.
Q. And would you say, Mr. Ekers, that the individuals
[fol. 114] shown in this photograph are approximately in the space normally used by pedestrians when they walk along that strip?

. . . . . .

A. I would say the big majority of the pedestrians would stay a lot closer to the curb than your pickets are. That is normal procedure.

. . . . . .

[fol. 115] Q. Now, again drawing your attention to this area in front of your market on Route 21, what is the practice or custom engaged in by pedestrians when they traverse north and south along Route 21 in front of that property? Where do they walk?

A. The same as any other highway—walk as close to the curb as they can, off of the pavement.

Q. But they don't walk on the highway, do they?

A. Not many.

. . . . . .

[fol. 116] Q. Mr. Ekers, what I am directing your attention to now are your purchases of cattle—beef or beef from cattle as distinguished from pork and other products of that nature. And I would like to know the source of those purchases.

[fol. 117] A. In the first place, I buy no cattle. You asked me that,

Q. What do you buy?

A. I buy dressed beef.

Q. Where do you purchase your dressed beef?

A. I purchase it from a number of sources.

. . . . . .

Q. Perhaps I can help you. You do purchase your dressed beef from Peerless, do you not, in Cleveland?

A. I purchase some of it, yes. I did purchase it.

Q. Aren't you purchasing it now?

A. No. They stopped me.

. . . . . .

[fol. 118] Q. Do you make any purchases of dressed beef from any packing companies outside of the State of Ohio?

A. I don't believe I did in 1953.

Q. Would your books and records show whether you did in 1953?

A. Yes.

Q. Have you purchased any dressed beef from outside the State of Ohio from January 1st, 1954, down to date?

A. No, sir.

Q. Do you know of your own knowledge, Mr. Ekers, the source of the cattle sold to you as dressed beef——

A. No, sir.

* * * * * * *

[fol. 119] Q. Without going through each entry you have on here, Mr. Moyer—and I see numerous other suppliers—can you give us the total gross purchases for that fiscal year from all the suppliers you have listed on Defendants' Exhibit 6-a to -L?

A. According to our auditor's statement, $873,976.23 for the fiscal year 1953.

The Court: Does that include all meats?

The Witness: That includes everything—meats, cheese, poultry.

* * * * * * *

[fol. 120] EUGENE B. MOYER, called by the defendant, being first duly sworn, testified as follows:

Cross-examination.

By Mr. Riemer:

Q. Mr. Moyer, you have already stated your address. You are employed by Fairlawn Meats, Inc., plaintiff in this action?

A. I am, sir.

Q. In what capacity do you serve?

A. Office manager and manager of the West Richfield plant.

Q. How long have you held that position as office manager, Mr. Moyer?

A. About a year and a half, sir.

Q. And in the capacity of office manager do you keep the books of the corporation?

A. I do, sir.

[fol. 121] Q. And you are familiar with the internal operations of the plaintiff corporation?

A. Yes, sir.

Q. Purchases?

A. Yes, sir.

Q. Source of purchases?

A. Yes, sir.

Q. Pursuant to a subpoena served on the corporation have you brought with you certain books, records and documents?

A. I have, sir.

Q. Do you have them?

A. I have the general ledgers.

Q. What is that document you hold in your hand?

A. I have some figures here, purchases of fiscal year.

Q. Where did those figures come from?

A. General ledger.

Q. Were those figures jotted down for the purpose of this examination?

A. Yes.

Q. The document or pad you hold in your hand is not a regular office document?

A. No, sir.

The Court: Not the original?

The Witness: No.

Q. But they are entries taken from your books?

A. That is correct, sir.

Q. And transcribed on that pad for the purpose of your testimony?

A. Yes, sir.

Q. And the books from which you have taken those figures are in court?

A. They are, sir.

Q. Now, Mr. Moyer, did you use the fiscal year of June, 1952, to June, 1953?

A. I did, sir.

Q. Are all the figures based on that fiscal year?

A. Yes, sir.

[fol. 122] Q. You have no figures for the period of June, 1953, to date?

A. No. I did make a comparison on January of this year.

Q. Comparison of what?

A. As far as percentages I made a comparison of January, 1954.

Q. Just the one month of January?

A. Yes, sir.

Q. And as compared to——

A. As compared to the Fiscal year 1953.

Q. Based on the documents which you brought and the entries you have transcribed on that pad, can you give us the gross purchases by plaintiff corporation of dressed beef from Gibbs in 1953? And when I say 1953 I refer to that fiscal year ending. We understand that?

A. $231,634.47.

Q. And of what did those purchases consist, can you tell?

A. Of beef, sir.

Q. Dressed beef?

A. Yes, sir.

Q. May I see those figures?——

(Witness indicates.)

—What did you do? Run them off by weeks?

A. Yes, sir.

Q. Just take Gibbs again—Earl C. Gibbs. First entry is $4622.00. Does that represent the first week of the fiscal year?

A. That's right.

Q. And follow right down the line, the various entries represent gross purchases from Gibbs for the successive weeks in that fiscal year?

A. That is correct.

Q. Until you arrive at a total of $231,634.47?

A. That is correct.

(Thereupon the papers furnished by the witness were marked as Defendants' Exhibits 6-A to 6-L inclusive.

[fol. 123] Q. Mr. Moyer, this has now been marked Defendant's Exhibit 6-A to -L. Does this compilation of figures represent the suppliers——

A. They do in the State of Ohio.

Q. —the suppliers of products to the plaintiff Corporation from within the State of Ohio?

A. That is correct.

Q. And you have listed all of the suppliers?

A. We have, sir.

Q. Now, you have told us about Gibbs, and on Exhibit 6-A I see the entry: Swift & Company. Can you tell us the gross purchases from Swift & Company?

A. $91,836.29.

Mr. Denlinger: Is that all beef too?

Q. Was that dressed beef, Mr. Moyer?

A. No, sir.

Q. What else did it consist of?

A. Consisted of pork, veal, lamb, luncheon meats.

Q. I see on Exhibit 6-A the entry: Wilson & Company. Is there a total figure for that?

A. Now, sir, Wilson & Company at that time were located in the City of Akron with a branch on East Market Street, and that's the purchases made from there, $28,330.05.

Q. From the Wilson & Company branch in Akron?

A. That is correct, sir.

Q. Any other purchases during the fiscal year 1953 from Wilson & Company other than in Akron?

A. Yes, through their local representative we purchased $19,166.07.

Q. What is the difference between these two compilations—first, the one on Exhibit 6-A and the second one?

[fol. 124] A. This, of Wilson & Company, they had a branch on West Market Street, and it was closed in February of 1953.

Q. And the second lot of purchases, how were they placed?

A. Through the local representative and shipped out of one of their other plants.

Q. Where were they shipped from, Mr. Moyer, if you know?

A. Well, they have about twelve different plants over the country—could be shipped from any one of them.

Q. Were they shipped from Ohio?

A. I would say not.

Q. You say not?

A. Yes.

The Court: This shipment of Nineteen Thousand and something was made after the Akron branch closed, is that correct?

The Witness: That is correct, sir.

Q. Now, the figures that you gave us previously of $28,330.05 were purchased through the Akron branch?

A. That is correct.

Q. Do you know where they were shipped from?

A. They could have been shipped from any place. In fact, some of that could have been from the State of Ohio, as far as that goes—as far as butter and cheese.

• • • • • • •

[fol. 125] Q. Without going through each entry you have on here, Mr. Moyer—and I see numerous other suppliers—can you give us the total gross purchases for that fiscal year from all the suppliers you have listed on Defendants' Exhibit 6-A and L?

A. According to our auditor's statement, $873,976.23 for the fiscal year 1953.

The Court: Does that include all meats?

The Witness: That includes everything, meats, cheese, poultry.

• • • • • • •

[fol. 126] Mr. Denlinger: That figure $873,976.23 represents all purchases for that fiscal year from the State of Ohio and any shipped out of the state?

• • • • • • •

Q. —can you tell us, based upon this Exhibit 6-A, the total gross purchases of the plaintiff corporation from the suppliers named on this Exhibit 6-A? That is the figure I want.

The Court: Exhibit 6-A to -L inclusive?

A. That is $753,099.94.

Q. Now I think that is correct on the record.

Mr. Denlinger: Yes.

Q. Now then, have you with you any figures showing purchases by the plaintiff corporation from outside the [fol. 127] State of Ohio? Can you answer that question?

A. Through local representatives?

Q. We'll get to that later on. I want to know if you have any figures with you showing purchases by the plaintiff corporation and received from outside the State of Ohio?

A. I have figures here for purchases from units located outside the State, through local representatives, which were delivered to us in the State.

Q. Do those figures show where the supplies came from?

A. No, they don't sir. Only the name of the company.

Q. But it is your testimony that they did come from outside the State of Ohio?

A. That is correct, sir.

Q. And I think you said the sales contract was made here in Akron?

A. That is right, sir.

Q. Now you hand me a two-page document. Do these contain all the figures?

A. They do, sir.

Q. Without going through all the questions I have asked you before, Mr. Moyer, is this document that has been handed to me based upon the entries from your books and was it prepared in the same was that Defendant s Exhibit 6-A to -L was prepared?

A. They were, sir.

(Said document was thereupon marked as Defendants' Exhibit 7-A and -B).

. . . . . .

[fol. 128] Q. Now, Mr. Moyer, again without going through each individual column here—and there are a number of additional columns—would you give us the [fol. 129] gross purchases by the plaintiff corporation, revealed by Defendants' Exhibit 7-A and 7-B, from units located out of the State of Ohio?

A. $103,706.35.

. . . . . .

Mr. Riemer: During recess, your Honor, we had marked two documents. The first is Defendants' Exhibit 8-A and -B.

Q. Mr. Moyer, what does Defendants' Exhibit 8-A and -B represent?

A. State of Ohio purchases from units located in the State of Ohio for the month of January, 1954.

Q. And again, without asking you all the questions I did before, was that document prepared from original book entries in the same fashion as the other exhibits have been?

A. It was; yes, sir.

Q. I notice on here again we have the entries for Swift, is that correct?

A. Yes, sir.

Q. And Armour?

A. Yes, sir.

Q. And Gibbs.

A. Yes, sir.

Q. Is Peerless listed, likewise?

A. I believe so.

[fol. 130] Q. Without going through each individual entry that you have made, Mr. Moyer, can you tell us, based upon this exhibit, the gross purchases for the month of January, 1954, from units located in Ohio?

A. $73,021.63.

Q. What is this document marked Defendants' Exhibit 9?

A. That is State of Ohio purchases from units located out of the State through local representatives, for the month of January.

Q. That is for January, 1954?

A. That's right.

Q. Again, you have listed there substantial- the same suppliers—Marhofer, Wilson, Oscar Mayer and so on.

A. I have sir.

Q. Did you give us the total?

A. $11,870.81.

Q. Now, Mr. Moyer, based upon your experience as an office manager and your observation of the books of the plaintiff corporation, are these purchases for January, 1954, representative purchases?

A. They are, sir.

Q. Would that figure be substantially the same for the other months during the year, down to the present time?

A. I couldn't tell you that, sir. I would say it would be an average.

Q. What about June, 1953—January, 1954?

A. I have the figures but I haven't accumulated them in the same order as I have these.

Q. Would they be substantially the same?

A. I would say they would be, yes, sir.

* * * * * * *

[fol. 131] HARVEY EKERS, recalled for continued cross-examination by the defendants, as follows:

Cross-examination.

By Mr. Riemer:

* * * * * * *

[fol. 132] Q. You testified yesterday, if I can recall your testimony—if my notes are correct—that the Union pre-
[fol. 133] vailed at Peerless not to sell you any products?

A. That's right.

Q. What Union did you refer to?

* * * * * * *

A. I don't know just how to answer the question except to say that I was told by the management of Peerless that they had been threatened by the Union if they gave me any meat.

Q. That is your best answer?

A. That is my best answer, yes, sir.

Q. Who told you this at Peerless?

A. I don't know whether he is an official—whether he is an official at Peerless, but Milton Davis, a salesman.

Q. And you don't know whether Milton Davis is an officer at Peerless?

A. I do know that he is a brother of the president.

* * * * * * *

[fol. 134] Q. Did this union Local 427 have their pickets around the Peerless plant when you were there?

A. They had representatives there.

Q. Who were those?

A. DeSantis and Samino.

Q. When did you see them there?

A. That time and on other occasions.

Q. That is this occasion we are talking about?

A. Yes, sir.

Q. When Milton Davis told you?

A. Yes.

Q. Did you see Samino and DeSantis there that day?

A. I saw them there that day and other times.

[fol. 135] Q. Did you ever talk to them there?

A. I had one very brief conversation with them.

Q. Who was that with?

A. That was with Samino. He and DeSantis were standing there together, and I mentioned the fact of my tire being flat.

Q. That was the conversation you had with Samino and DeSantis about a flat tire?

A. My flat tire, yes.

Q. You don't know what occasioned the flat tire, do you?

A. That is something I am unable to say. I walked into the cooler as soon as I got there and wasn't there to see.

* * * * * * *

Q. Let's go back to this Peerless incident. You were there one day that you talked to Milton Davis, the salesman.

A. Yes, sir.

Q. And is that the only time you saw Samino and DeSantis there?

A. No, I saw them there other times.

Q. You saw them there. Any other occasion?

A. Yes.

Q. But you never talked to them?

A. No.

Q. Except about the tire incident.

A. But I might say, when I went into the cooler they followed me into the cooler—both Samino and DeSantis.

[fol. 136] Q. You don't know what they were doing in the cooler?

A. Just observing whether I made purchases, I assume.

• • • • • • • • •

Q. Do you know whether the Peerless Packing plant on West Sixty-fifth Street is within the territory assigned to business representative Samino?

A. It may be in the territory assigned to them, but I understand that their Union is not the Union that is in at this plant.

Q. The production workers there are in another Union, that is what you mean?

A. That is my understanding, yes.

Q. Now we come down to Gibbs. I believe it was your testimony yesterday that Gibbs refused to sell you any products?

A. Yes, sir.

Q. Did you have a conversation to that effect with any of the Gibbs people?

A. I had conversation to that effect with Earl M. Gibbs, the Vice-President.

Q. And what did Earl M. Gibbs, Vice-President, tell you?

A. He told me his father, who was the President, was in Florida and it was up to him to make the decision. He had been threatened with slow-down or with reprisals—I question whether he said slow-down—but reprisals if he sold, and it was up to him to make the decision. And his decision was that sooner than jeopardize his business he wouldn't sell me.

• • • • • • • •

[fol. 137] Q. Now, this occasion when you say you saw Mr. Samino and Mr. DeSantis at Swift & Company. Yesterday you told us that they followed you? Is that correct?

A. From Swift & Company to Peerless Packing Company.

Q. From Swift to Peerless?

A. Yes, sir.

Q. After you left Peerless did they follow you?

A. They followed me—I don't know whether on that day

I went to Earl Gibbs, but on other occasions they followed me to Earl Gibbs, Incorporated.

* * * * * * *

Q. Did either gentleman, regardless of the day on which it occurred—did either Samino or DeSantis talk to you that day?

A. They talked to me the day of this flat tire incident, [fol. 138] yes, sir.

Q. I am talking about the day you say they followed you to Brookpark and Broadview and there you lost them. On that day did they talk to you?

A. I don't recall whether that was the day of the tire incident or not.

Q. Did they stop you on that day? That is the day you complained to the police.

A. They didn't stop me. I didn't complain to the police; I just told the policeman what was happening. I don't know whether you call that a complaint or not.

Q. At least, on that day you talked to the police, neither Samino nor DeSantis stopped you?

A. No, sir.

* * * * * * *

[fol. 139] Q. You do recognize, do you not, that you do have a dispute with your employees at West Richfield:

A. No, I don't recognize that.

Q. Your employees at West Richfield are on strike.

[fol. 140] A. They're not working.

Q. That's right, and they haven't been working for you since February 4th, 1954.

A. That's right.

Q. Do you know an individual by the name of David Rodocker?

A. I do?

* * * * * * *

A. I know of no dispute between he and I.

* * * * * * *

Q. Do you know an individual by the name of Therom O'Dell—sometimes called Digger O'Dell.

A. Yes.

[fol. 141] Q. And he worked for you at Tallmadge?

A. Yes, sir.

• • • • • • •

Q. Do you recognize his participation in the strike as a dispute with you?

A. No, I don't.

• • • • • • •

Q. Thomas Tandarich was in your employ at Tallmadge?

A. Yes, sir.

Q. He is not working today?

A. No, sir.

Q. He is out on strike?

A. No, sir, he has resigned.

• • • • • • •

Q. Do you know an individual by the name of Don Herbruck, of about sixteen—seventeen years?

A. Yes, sir.

• • • • • • •

Q. He is out on strike?

A. His father told us he *he* wasn't. His father is his [fol. 142] guardian.

• • • • • • •

Q. What about Walter D. Carpenter? Did he work for you at Tallmadge?

A. Yes, sir.

Q. And he joined the strike on February 4th, 1954, didn't he?

A. I wasn't aware of anything of that kind until it was brought out at a previous court hearing. I didn't know the man was on strike until after the court hearing, and I went to see him and he told me he hadn't signed any—

knowingly signed any papers asserting he was on strike [fol. 143] and had given me a letter of resignation.

Q. Is it your understanding that employees sign some sort of a certificate that they are on strike?

A. I only know what the man told me.

Q. And he told you he hadn't signed?

A. He hadn't knowingly signed an affidavit saying he was on strike.

Q. And he gave you a letter or resignation?

A. Yes, sir.

Q. Resignation on what? From the Union or from your employment?

A. From my employment.

Q. Did you ask for a letter of resignation?

A. I don't know whether I did——

Q. Oh, come now, Mr. Ekers——

Mr. Denlinger: Oh, just a minute.

The Court: Sustained.

Q. Mr. Ekers, did you go to see this man Carpenter?

A. Yes, sir, I did.

Q. What was the reason for going to see him?

A. To talk to him about this matter.

Q. To talk to him about the fact he had gone on strike?

A. Or how come he had gone on strike.

Q. Did he or did he not report for work February 4th, 1954.?

A. He wasn't scheduled to report for work February 4th, 1954. He just came in part-time when we needed him; he wasn't a regular employee.

Q. When was the first time he was supposed to be an employee or work?

A. He worked when we needed him, not a regular employee. He never worked over five or six hours a week. [fol. 144] Q. Tell us why you went to see Carpenter.

A. To find out whether he actually was on strike.

Q. And he told you he wasn't on strike?

A. He told me he didn't knowingly sign. I mentioned the fact that you people had an affidavit stating he was on strike. He told me he didn't knowingly sign an affidavit stating he was on strike.

Q. How did this issue of a resignation arise?

A. I don't know how I brought it up—I don't know whether I brought it up or he did. If the question comes to that you can get his version.

Q. I want your version.

A. I don't know whether I brought it up or he did.

Mr. Denlinger: Do you want the letter, Mr. Riemer? Here's the letter with his signature, if you want it.

Q. Did you ask him to resign?

A. I don't know whether I did—I could have but I don't remember whether I did.

* * * * * * *

[fol. 145] Now, after the strike occurred February 4th, 1954, did you, Mr. Ekers, make any home calls or visits to the people who hadn't come in to work?

A. Not that I can recall.

Q. Wait a minute. You did go to visit Carpenter, didn't you?

A. Not at his home.

Q. Let's broaden the question—at their homes or any other place.

A. To the best of my recollection Mr. Carpenter is the only one that I visited, I am almost positive.

Q. Where were the resignations of Tandarich and Herbruck secured?

A. I understand at my place of business.

* * * * * * *

Q. Do you know an individual, Marietta Channel?

[fol. 146] A. Yes, sir.

Q. She was employed at your West Market Street store?

A. Yes, sir.

Q. Did Marietta Channel stay away from work for the period of February 4th to February 11th, 1954?

A. It is not my understanding——

Q. It is your understanding what?

A. That she only was off one day.

Q. That was the day the strike started?

A. Yes. It was my understanding she came back the next day.

Q. She is now working for you?
A. And has been working continuously, yes.

• • • • • • •

Q. Now, on the night of February 1, 1954, did you hold a meeting of your employees?
A. I can't state that that was the exact date, but around that date I did hold a meeting,—I think it was the first, yes —of some of my employees.
Q. Let's try to be definite about the date. There has been some testimony here that the Union held a meeting on February 2nd, and on February 3rd you met in Cleveland with Mr. Pollock and Mr. Dougherty. Now, using those two dates as points of reference, could you now tell us whether that meeting wasn't held on February 1, on Monday?
A. I can only say I am pretty sure it was.
[fol. 147] Q. Where was that meeting held?
A. At Leon's Tavern.
Q. That is in Akron?
A. In Akron, yes, sir.
Q. At what time was it held?
A. Oh, eight to eight-thirty.
Q. And who attended that meeting?
A. About fifteen—approximately about fifteen of our male, full-time employees at Tallmadge—a dozen or fifteen.
Q. Were any of the employees from West Richfield invited to the meeting?
A. No, sir.
Q. Any of the employees from Market Street invited to the meeting?
A. No, sir.
Q. Was David Rodocket at the meeting?
A. To the best of my knowledge he was—yes, he was.
Q. Was Helen Mayo at the meeting?
A. No. I said just males.
Q. You said there was fifteen or so?
A. A dozen or fifteen.
Q. Did you invite all of the male employees at Tallmadge to attend the meeting?
A. No, sir. I invited what I considered my key employees—more the skilled workers.

Q. And in inviting people to attend the meeting at Leon's Tavern on February 1, 1954, did you make any distinction between those who were Union members and those who were not Union members?

A. No, sir.

Mr. Denlinger: Wait a minute——

The Court: He may answer.

A. I don't know who of my employees are Union members.

[fol. 148] Q. You say that at least prior to February 4th, 1954, you did not know who were Union members?

A. I don't know who are paid-up Union members.

Q. Never mind paid-up members; I don't know that myself.

A. It is my understanding, from the constituton, they're not members unless they are paid up.

* * * * * * *

[fol. 149] Q. Let's get back to the meeting of February 1, 1954. Will you tell us the occasion for that meeting and why it was called?

A. Because we were being continually pressed by the Union to sign a Union contract, and I wanted to find out at that date—I had had previous individual expressions from a few of these key employees, and I wanted to find out at that date whether their thinking was still the same on the matter.

Q. At that time, February 1st, there was no strike?

A. No, sir.

Q. The purpose of the meeting was to ascertain from your employees whether the employees wanted you to sign the contract?

A. That's right.

Q. What did you say at that meeting, Mr. Ekers?

* * * * * * *

A. I can't recall the exact words, any more than the gist of the conversation was what I have just got through telling you—that the Union was threatening us with pos-

sible trouble if we did not sign a contract, and I wanted the employees' reactions to that situation.

• • • • • • •

[fol. 150] Q. Mr. Ekers, before we recessed for lunch I was questioning you concerning the meeting that you had called at Leon's Tavern February 1st, 1954, and you told us that there were fifteen employees——

A. I don't remember the exact number, twelve to fifteen.

Q. Did that number include Ray Thursby, your manager?

A. Yes, sir.

Q. Did he express any opinion on that evening concerning whether you should or should not sign a contract with the Union?

A. I don't remember. There was remarks made all around the table.

• • • • • • •

[fol. 151] Q. Was Thursby the only supervisor who was there?

A. No, I think Mr. Moyer was there.

Q. Mr. Moyer, your bookkeeper?

A. Yes, I think so.

Q. Summed up, Mr. Ekers, did you invite some of those people who were there to express an opinion about the Union?

A. Yes, sir.

Q. What did they tell you?

A. Everyone of them that expressed any opinion were against us signing the contract——

Q. That is, against the plaintiff corporation signing a contract?

A. Yes.

Q. Can you tell us who expressed that opinion?

• • • • • • •

[fol. 152] A. I would say during the course of the evening practically everybody in the room expressed themselves as being against it.

• • • • • • •

Q. Did you discuss with any of the people present any of the terms of the proposal that had been submitted to you by the Union?

A. No, only the angle that was brought by us: Do our employees want me to sign a Union contract to force the members into the Union—that is, the working conditions, hours, pay—wasn't brought in it—never was brought up.

• • • • • • •

[fol. 153] Q. Isn't it a fact, Mr. Ekers, that at that meeting on February 1st, 1954, you told those employees, that you had invited to the meeting, that you didn't want them to join the Union?

A. I did not make that statement, no, sir.

• • • • • • •

[fol. 154] Q. Starting October, 1953, right down to February 3rd, 1954, you had engaged in a series of meetings or conferences with Mr. Pollock or Mr. Dougherty, had you not?

A. That's right; yes.

Q. And during those discussions or meetings that were held with either both Mr. Pollock and Mr. Dougherty or [fol. 155] Mr. Pollock alone, you discused a number of issues, did you not, pertaining to the contract? You can answer that yes or no.

A. Yes.

Q. And one of the issues you had discussed—whether it was in the exact terms of the Union proposal—was the general subject of the Union shop?

A. Yes.

• • • • • • •

[fol. 156] Q. During all this time, at these meetings you held with Pollock or Dougherty, or both, is it not a fact, Mr. Ekers, that the real problem on your mind was how to convert or change over your existing operations to the suggestions made by the Union?

A. I wouldn't say that.

Q. Would you say that you were particularly concerned during these discussions with the cost effect—the dollars

and cents effect—of some of the Union suggestions upon your operations?

A. I gave that some thought.

Q. And, as a matter of fact, wasn't that the most important problem on your mind—how much it would cost you?

A. No, sir.

Q. Well, what was the most important problem?

A. I have said the most important problem.

Mr. Denlinger: State it again.

A. It would force my men into the Union against their will. And another thing, too, it would mean that I would no longer have the right to hire and discharge as I felt proper.

• • • • • • •

[fol. 157] I was told that, generally, was the contract I would have to sign, with very slight modifications.

Q. Did Pollock tell you that?

A. Pretty much those words, yes, that that was the standard contract and they couldn't divert from it very much.

• • • • • • •

[fol. 158] Q. At the meeting of February 3rd you, in substance, stated that you did not wish to negotiate any further with the Union. Am I correct?

A. I told them I wasn't ready to sit down and negotiate a contract with them now.

Q. And didn't Mr. Pollock ask you to continue and meet and try to reach an agreement on a contract?

A. He said this: they had voted to have a strike and that a strike might occur at any minute—or any day—I won't say any minute—he said it might be tomorrow and might be a month from now. And I said, "Well, I hear what you say about that situation."

Q. You heard what Pollock said?

A. Yes.

• • • • • • •

[fol. 159] Redirect examination.

By Mr. Denlinger:

Q. Mr. Ekers, do you recall that this morning Mr. Riemer inquired of you with reference to your conversation with Mr. Gibbs?

A. Yes, sir.

Q. And you testified that you had talked to Mr. Earl M. Gibbs, the Vice-President.

A. Yes, sir.

Q. And that Mr. Earl M. Gibbs told you that he couldn't sell you merchandise because it would strain his relationship with the Packers Union in his plant?

A. He didn't say Packers Union, but that's the Union that's in the plant. He said Union.

Q. He said the Union that's in his plant?

A. Yes.

Q. In connection with that conversation did he write you a letter?

A. Yes, sir.

Q. I will hand you what has been marked for the purpose of identification as Plaintiff's Exhibit 10, and ask you if that is the letter that Mr. Earl Gibbs personally gave to you on the date appearing at the top.

* * * * * * *

[fol. 160] Q. This letter reads: "B. H. Ekers has been a customer of ours for over 30 years, and is a valued account. We recently were advised by your union president that it would be against our best interest, as far as good relationship with our union is concerned, to continue to sell to Mr. Ekers. In order to preserve our good relationship with the union and its members, our workers, we have abided by their request." Was there ever any question of credit with this company that prevented you getting merchandise?

A. No, sir.

Q. And before this strike of the Butchers Union did you ever at any time have any difficulty in obtaining merchandise at Gibbs?

A. No, sir.

Q. And was there ever at any time any question between

you and Earl C. Gibbs, Incorporated, regarding the delivery of merchandise for any reason except the reason given by Mr. Gibbs in his letter of March 5th, 1954?

. . . . . .

A. Except this, no.

. . . . . .

[fol. 161] By Mr. Denlinger:

Q. This morning Mr. Riemer talked with you about calling on an employee by the name of Walter D. Carpenter. Do you remember that?

A. Yes, sir.

Q. He inquired of you talking to that gentleman.

A. Yes, sir.

Q. Now, you told the Court that Walter D. Carpenter was not a regular employee but one who was called to work at Tallmadge as you needed him. Is that correct?

A. Yes. He didn't average over three or four hours a week.

Q. Subsequent to the strike, which began on February 4th, did you call upon Walter D. Carpenter to ascertain whether or not he had become a member of the Butchers Union, at the time that you learned of that claimed situation in the hearing before Judge Wanamaker? Did you talk to him after that hearing or before that hearing?

A. I talked to him after that.

Q. After the hearing?

A. Yes.

Q. Had you concerned yourself prior to the hearing in Judge Wanamaker's courtroom, when Mr. Riemer's client was claiming Carpenter as an employee who was a member of the Union—had you discussed anything with Carpenter about Union affiliations?

A. I knew Carpenter was a Union man because he worked at a Union shop.

Q. Before you hired him?

A. Before I hired him, yes.

Q. All right. This paper, marked Plaintiff's Exhibit 11, will you tell the Court whether that is in your handwriting.

A. This here is.

Q. The top part of it?

A. Yes, sir.

[fol. 162] Q. And whose signature is it?

A. That is Walter Carpenter's.

Q. Did Walter Carpenter sign his name at the bottom of this page in your presence, and after he read this statement?

A. Yes, sir.

Q. And this statement, dated February 27th, 1954—is that the correct day on which he did——

A. Yes, sir.

Q. This statement says: "This is to state that I am hereby resigning from your employ of my own free will as of today." Is that the paper he signed at that time?

A. Yes, sir, that's right.

Q. Has he ever tried to work for you since?

A. No, sir.

Q. Has he ever been on the picket line to your knowledge?

A. No, sir.

Q. Let's go back to this time in Cleveland, which was after March the 6th, but during the time that Judge Wanamaker's order of injunction was in suspension in the Federal Court. And I want you to state to the Court again where it was that you talked to Milton Davis.

A. I can't recall whether the conversation was in the Peerless office or whether it was in the Peerless cooler.

Q. It was on the Peerless property, is that correct?

A. It was on the Peerless property, that is correct; yes, sir.

Q. And it was on that occasion that Milton Davis told you what?

A. He says: "The Union told us not to sell you."

Q. All right. Mr. Ekers, at that time were you at the Peerless Company to buy merchandise?

A. Definitely.

[fol. 163] Q. Did you talk to Mr. Milton Davis, the customary salesman from whom you made the purchases?

A. Yes, sir.

Q. Had you previous to this occasion made the purchases at Peerless through Mr. Davis?

A. Yes.

Q. And who was present in the cooler at the Peerless Company at the time that this occurred?

A. I couldn't recall who was in the cooler. They have a lot of workmen working in the cooler all the time.

* * * * * * *

Q. When did you see Samino and DeSantis there?

* * * * * * *

A. I saw them there in future visits to the place.

Q. In future visits?

A. Yes.

Q. Were you in the future able to make purchases at Peerless?

A. No, sir.

Q. But you did go back and try in spite of what Mr. Davis had told you?

A. That's right, yes.

Q. Prior to the strike on February 4, 1954, did Samino and DeSantis ever appear at any of the docks or places of supply in Cleveland where you purchased merchandise?

* * * * * * *

A. I never saw them before.

* * * * * * *

[fol. 164] Q. All right. Did you ever see Samino and DeSantis there at any of your places of supply before this strike occurred?

A. No, sir.

* * * * * * *

Q. Are there any sidewalks at the Tallmadge place of business?

A. No, sir.

Q. Are there any paths that have been worn by pedestrians using the space in front of your building for traffic, back and forth?

A. There's not enough foot traffic on the road to make a path.

Q. Did you, during the entire time you have been out there, ever see anyone actually using the front, walking towards Tallmadge or from Tallmadge, to your knowledge? Did you ever see anyone walking at any time?

A. I can't recall anybody.

Q. And the same goes for Richfield, doesn't it?

A. Yes, sir.

Q. There are no sidewalks at Richfield?

[fol. 165] A. Yes, sir—or no, sir, there aren't.

Q. There are no sidewalks?

A. That's right.

Q. There are no paths made there by pedestrians using it as a piece of land over which to traverse, going from one point to another.

A. That's right. Both places are relatively in the country—you might say, open spaces.

Q. And was there anything in connection with the curb, or a short distance from the curb, indicating a path or walk of any kind for the purpose of pedestrians?

A. No, there is no path or walk.

Q. At either place, West Richfield or Tallmadge?

A. No, sir.

Q. Now, you had a meeting with your people on February 1st, 1954 at what you called Leon's Tavern, in the evening. Is that right?

A. Yes, sir.

Q. How far is Leon's Tavern from your place of business?

A. About a half a mile.

Q. Was Leon's Tavern selected as a place of meeting for your employees because of convenience of the employees that you called there that night?

A. That's right. Some of them were working late—on the evening shift—and they could come from work.

Q. So the meeting was held after your store hours were closed at Tallmadge, is that right?

A. That's right.

. . . . . .

[fol. 166] Q. What was the purpose of the meeting?

A. To get my members—to sound out my members—or

employees—as to their thinking on the matter of signing a Union contract.

Q. I hand you what has been marked for identification as Plaintiff's Exhibit 12, and ask you to state if you recognize the signatures that appear on that paper, and if you do, tell the Court in what store they are employed.

A. This is one of the two papers that were signed by our employees stating their feelings in this matter.

Q. You recognize the signatures on that page?

A. Some of them I recognize. I have no particular reason to recognize others that I didn't have any date with them or contact with.

Q. All right. That paper was signed where, if you know?

A. At my place of business, at Tallmadge.

Q. At the Tallmadge store?

A. Yes, sir.

Q. And what store do the employees on that sheet work—what store do those employees work in?

A. Glancing over it I would say they are all Tallmadge employees.

Q. Those are all the Tallmadge employees. All right. I will hand you what has been marked for identification as Plaintiff's Exhibit 13 and ask you to state to *state to* the Court whether or not the signatures on that page are signatures of employees of your company, and state to the Court in which stores those employees work.

A. There are ten signatures there, all but the first one are employees of the West Market Street store; the other one is Mr. Moyer, who is the office manager of [fol. 167] the business.

Q. This morning you were interrogated by Mr. Riemer regarding a gentleman by the name of S. P. Speece.

* * * * * * *

Q. And Mr. Speece was resigning because of "complying with the request of Mr. Dugan in Saturday Beacon Journal I wish to give up my part-time job with you at present." Was this man working on another job?

A. Yes, sir.

Q. What other job was he working on?

A. I am pretty sure he was working at Goodyear Air Craft.

* * * * * * *

Q. Mr. Ekers, you testified in some detail regarding the nature of your business, the amount of wholesale and retail business. I now want to ask you to state to the Court whether or not any of your sales—whether they be wholesale or retail, are made outside the State of Ohio?

A. None, absolutely.

[fol. 168] Q. The entire sale and delivery of all merchandise in connection with your entire business is done wholly with customers within the State of Ohio?

A. Yes, sir.

Q. And how much do those annual sales amount to, in round numbers?

A. Between a million and a million and a half.

Q. For a fiscal year?

A. Yes, sir.

* * * * * * *

Q. You don't do any slaughtering at all out there?

A. No, sir.

Q. You, therefore, have no inspection, by way of Federal inspection of meat or local inspection, because you are wholly in the retailing and wholesaling of the finished product, is that right?

A. We have food inspection.

Q. You have inspection that comes from the Food De-

[fol. 169] partment?

A. That's right; no slaughtering.

Q. You have no license or privilege for slaughtering nor have you sought any?

A. No, sir.

Q. Do you make any reports to the Federal Government, except Federal Tax Reports, as any other person?

A. No, sir.

Q. You do pay into the Workmen's Compensation and pay a franchise fee to the State of Ohio?

A. Yes, sir.

Q. Now, is not this the fact, I want you to tell the

Court since February 4, 1954, from an examination of your business, have your sales dropped off?

A. Yes.

Q. About what percentage?

A. You want the comparison——

Q. —to last year.

A. At this time?

Q. Yes.

A. I would say they're off approximately one-third.

Q. From 20 to 30 per cent you say, would you?

A. Approximately 30 per cent.

• • • • • • •

Recross examination.

By Mr. Riemer:

Q. Mr. Ekers, tell us, in this handwriting in blue ink on Plaintiff's Exhibit 11 the handwriting of Carpenter?

A. That is my handwriting.

Q. Oh, that is your handwriting?

A. Yes, sir.

Q. You wrote that down there?

A. Yes, sir.

Q. And you read it to Carpenter?

A. Well, I showed it to Carpenter after discussion of the matter.

Q. And he signed it after discussion on the matter?

A. Yes.

Q. What was the discussion you had with Carpenter [fol. 170] about it?

A. I told him I was surprised to hear he had gone on strike because he never stated that he ever had any—always seemed on the best of terms and never stated he had any grievance at all. And he replied and told me he never knowingly signed an affidavit stating he was on strike.

Q. Plaintiff's Exhibit 11 is dated February 27th.

A. Yes, sir.

Q. Is that the time you visited Carpenter?

A. Yes, sir.

Q. Was it at his home?

A. No, sir.
Q. Where?
A. In the Falls.
Q. Where?
A. I met him coming out at work, at the corner of Bailey Road and Front Street.
Q. Where was this signed?
A. There.
Q. On the sidewalk?
A. In his car.
Q. In his car in Cuyahoga Falls?
A. That's right.
Q. Did you just chance to meet Carpenter?
A. I figured he would be coming out of work that time. He lives in Ravenna and has no telephone number and I couldn't communicate with him unless I went all the way.
Q. You had a pretty good idea he would be at his place of work?
A. Yes, sir.
Q. And he would be coming about that time?
A. That's right.
Q. And both of you sat in his car?
A. In his car.
Q. And you wrote this out?
A. And I told him——
Q. You knew at the time, February 27th, 1954, did you not, Mr. Ekers, that Carpenter had executed an affidavit, [fol. 171] which is a matter of record in this court, that he had authorized the Union to represent him and that he joined the strike on February 4th, 1954?
A. I knew there was an affidavit to that effect, yes, sir.

* * * * * * *

[fol. 172] Q. Mr. Ekers, to go back to this matter. At the time that you asked Carpenter to sign that resignation you knew of this affidavit, did you not?
A. Yes, sir.
[fol. 173] Q. And is it your testimony that Carpenter denied that he signed this?
A. He told me he signed a paper but didn't know that it stated he was on strike.

Q. Now, Carpenter was a part-time employee, was he not?

A. Yes, sir.

Q. Is it your custom or practice in the management and operation of your business to request employees to resign other employment?

A. We have not—the man told me, when I went to see him, that he didn't want to cause me any embarrassment in this matter—he didn't know he signed the affidavit and would be only too glad to give me a resignation.

Q. Have you on a previous occasion, when you had no need for an employee, requested them to resign?

A. No, sir.

Q. You either discharge them or lay them off, do you not?

A. I don't know. I can't ever recall discharging an employee.

Q. And if you have no need for an employee you lay them off?

A. If I have no need, but I——

Q. You don't request them to resign, do you, Mr. Ekers?

A. I have never had any need to discharge or lay off any employee because my business, up to the strike, was increasing all the time.

Q. Is this the first time you ever asked an employee to resign?

A. I didn't ask him to resign.

Q. Is it your testimony that this man Carpenter voluntarily offered to resign?

A. Yes, sir.

* * * * * * *

[fol. 174] Q. Can you fix a little more definitely the time of the conversation with Milton Davis, of Peerless Packing?

A. It was very shortly after the strike was started that I went to the Peerless Packing. I think my purchase records will show the time. I went to the Peerless Packing Company to buy meat, and they told me they couldn't sell me——

Q. All right. You have already testified as to what Milton Davis told you. Now I want you to tell us—and

do you have any records that will verify or corroborate your recollection—I want to know when you talked to Milton Davis.

A. Within three or four days after they started the strike.

• • • • • • •

[fol. 175] Q. When was the conversation, though, with Milton Davis when he said to you that Peerless wouldn't sell you any more goods?

A. Within four days after the strike started.

• • • • • • •

Q. Did you close your Tallmadge operation early in order to hold the meeting?

A. No, sir.

[fol. 176] Q. It was held after work?

A. After work, yes.

Q. Now, we have here Plaintiff's Exhibit 12, dated February 10th, 1954. I think you have testified this was signed—or those are the signatures, so far as you can identify them—of your employees at Tallmadge? Correct?

A. Yes, sir.

Q. I see here the signature of David Rodocker.

A. Yes, sir.

Q. He is on strike, is he not?

A. Now, yes.

Q. I see here the signature of Ray Thursby.

A. Yes.

Q. He is your manager?

A. That's right.

• • • • • • •

[fol. 177] Q. Who circulated this petition—physically?

A. I can't answer the question. My manager, Mr. Thursby could.

Q. Do you know who drafted, dictated or composed the language—the typed language—appearing at the top of the petition?

A. No, I don't. Maybe he could tell you that, too.

Q. You don't know who passed it amongst the employees?

A. I think he had it prepared and notified the employees of it, and——

Q. You think Mr. Thursby, your supervisor——

A. I am pretty sure.

Q. —had it prepared and circulated?

A. Yes, sir.

Q. And Mr. Thursby is the manager of your Tallmadge plant?

A. Yes, sir.

Q. And he is a supervisor?

A. Yes, sir.

Q. Does he hire employees?

A. Yes, sir.

Q. Does he fire employees?

A. He never has that I know of.

Q. Does he have the right to discipline employees?

Mr. Denlinger: Oh, object, your Honor please. We are not trying a Labor Board case.

Mr. Riemer: Sometimes I am afraid we are, Mr. Denlinger, because you have brought the issues up, and not [fol. 178] we.

Q. Now, did you, Mr. Ekers, circulate any such petition at West Richfield?

A. No, because at the time this petition was circulated there was only two—we circulated it with the employees that were still—we gave them a chance to sign it if they so wished, the employees that were still there. There was only two or three that remained at work. And they, I think you will find, are on that other petition.

Q. Your West Richfield employees signed Plaintiff's Exhibit 13, is that it? Can you name them?

A. (Examining Exhibit 13.) This is one of them.

Q. Robert W. Hurst.

A. And Cecil Miller.

Q. Robert W. Hurst is a West Richfield employee?

A. Yes.

Q. And he is the manager of West Richfield?

A. No, I woudn't say that.

Q. What do you call him?

A. I would say he is just a meat cutter. Mr. Moyer is the manager.

Q. And Mr. Moyer signed?

A. Yes, sir.

Q. You have the manager and one of your supervisors signing it.

A. I didn't say he was a supervisor.

Q. Mr. Moyer isn't a supervisor?

A. Mr. Moyer is, I mean Mr. Hurst isn't.

Q. Is Mr. Hurst in the courtroom?

A. No, sir.

Q. Now, can you tell us who circulated this petition? That is, physically circulated it.

A. There might have been more than one person circulated it.

[fol. 179] Q. Do you know?

A. It was taken over to my West Market Street store, and the manager there talked to the employees to find out whether they cared to sign such a paper.

Q. That is Mr. Moyer?

A. No. West Market Street is William H. Brigham.

Q. He appears as signature 5 in the first column.

A. That's right.

Q. And he signed it?

A. Yes, sir.

* * * * * * *

Q. You told Mr. Denlinger, in response to an inquiry that your sales had dropped off approximately one-third.

A. Yes, sir, from last year.

Q. What period of time is covered by that, please?

A. Well, I would say February and March as compared to February and March of the previous year.

* * * * * * *

[fol. 180] THOMAS J. COOK, called by the defendants, being first duly sworn, testified as follows:

Direct examination.

By Mr. Riemer:

* * * * * * *

Q. What is your profession?

A. Certified public accountant.

Q. Are you licensed and authorized in practice as such in the State of Ohio?

A. I am a certified public accountant of Ohio.

Q. Is one of your clients the Earl C. Gibbs, Incorporated?

A. It is.

Q. What services do you perform for Earl C. Gibbs Incorporated?

A. We make an annual audit of their books, render financial statements, annual audit, and prepare their income tax return, franchise tax returns, personal property tax returns.

* * * * * * *

[fol. 181] Mr. Riemer: * * * let me advance what I pro-
[fol. 182] pose to show from this witness. I propose to show, based on the document Mr. Cook has prepared for us, taken from Gibbs' records, a brief statement showing the source of cattle purchases by Gibbs for the year 1953 —their source—the percentage of cattle received by Gibbs from outside the State of Ohio. And then in turn, following that, if I am permitted to continue, the total sales for the year 1953 to Fairlawn Meats, Inc. My theory is simply this, that those figures will indicate a percentage breakdown showing, percentage-wise, the purchase by Gibbs from outside the State of Ohio, and then, in turn, the total sales of all the cattle purchased from Gibbs by Fairlawn Meats. And since no distinction is made by Mr. Ekers whether he purchased meats or dressed beef from Gibbs, I think it follows reasonably from that, that substantially the same percentage is revealed in purchases by Fairlawn as revealed by Gibbs of his purchases. In other words,

relatively speaking, the same percentage of sales by Gibbs from outside the State of Ohio. Let's say, for example, it is 60 per cent, that same 60 per cent would be reflected in sales to Fairlawn. I recognize that the cattle came to rest in Cleveland, slaughtered in Cleveland and dressed in Cleveland.

The Court: Then doesn't interstate commerce stop there?

Mr. Riemer: No.

Mr. Denlinger: It does according to the Schecter case, and it has not been overruled.

• • • • • • • •

[fol. 183] Q. Mr. Cook, did you prepare or cause to be prepared from the books of Earl C. Gibbs, an account of the purchases of Gibbs for the last quarter of the year 1953? You can answer yes or no.

A. Yes, sir.

Q. And does the account you prepared, based upon figures of Gibbs and books of Gibbs reveal the source of the cattle purchased by Gibbs within the State of Ohio?

• • • • • • • •

[fol. 184] Q. (By Mr. Riemer) Go back a question. Can you tell us from the documents prepared by you, or under your supervision, based on the books of Gibbs, the percentage source for last quarter of 1953, of cattle purchased by Gibbs.

A. According to the—May I qualify it just a bit?

Mr. Denlinger: No. Just answer the question.

A. Purchases within the state, 5484 head of cattle.

Q. And outside?

A. Outside the state, 8758 head of cattle. The percentages are as follows: within the state 38.50; without the state, 61.50.

• • • • • • • •

[fol. 185] Q. Now, Mr. Cook, did you prepare, or have caused to be prepared at my request, an analysis of the account of Fairlawn Meats, Inc., with Earl C. Gibbs for the year 1953?

A. I did.

Q. And can you give us the total charges for that year, please.

A. January 1st——

Q. No, I don't think you have to break it down by months.

A. $146,073.90.

The Court: That is for the entire year 1953?

The Witness: $146,073.90.

Q. I hand you what has been marked as Defendant's Exhibit 15-A. Does this sheet—15-A—reveal the figure you have testified to concerning the percentage source of supplies?

A. This statement here is revealed in the exhibit.

Q. And Defendant's Exhibit 15-B is the statement of total charges from Gibbs to Fairlawn Meats for the year 1953?

A. According to the ledger account, yes, sir.

• • • • • • •

Cross-examination.

By Mr. Denlinger:

Q. Who is employing you in this matter?

A. I took my instructions from Earl M. Gibbs, that is who I am looking to—that is my client.

• • • • • • •

Q. Who did you talk to about this case?

A. Earl M. Gibbs and Sam Pollock.

• • • • • • •

[fol. 186] Q. What was your conversation with Mr. Pollock?

A. Earl M. Gibbs called me up.

Q. When was this.

A. Along the early part of March, and asked me to be at the Gibbs office the next morning.

Q. In the early part of March, is that correct?

A. Early part of March, yes, and at that time he intro-

duced me to Mr. Pollock and said there was a dispute and they wanted certain information of the Fairlawn Markets, Incorporated—from Fairlawn Meats, Incorporated—in regard to a certain dispute.

• • • • • • •

[fol. 187] A. And he would like to know whether I could state whether these sales were from cattle purchased within the state or without the state. I said I couldn't.

Q. And you said you couldn't?

A. That's right.

Q. What did you mean by that?

A. They don't keep a lot statement. When a carcass comes down they don't keep a lot statement, they don't follow it through. The animal is there, the carcass card is there, but when the sale is made it is only the loins of beef, or whatever it happens to be, is on the invoice.

Q. In other words, you don't know what the meat that Mr. Ekers got—whether it came from a cow in Argentine or a cow in Ohio, do you?

• • • • • • •

A. I have no knowledge of what he actually got—I mean, [fol. 188] what cattle it came from—that's right.

• • • • • • •

Q. And you can't say and don't attempt to tell this Court that the merchandise that Mr. Ekers got came from animals outside of Ohio, do you?

A. I can only give the record of what he purchased. What animals it came from I can't say.

• • • • • • •

[fol. 189] RAY THURSBY, called by the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Denlinger:

• • • • • • •

Q. What is your business?

A. I am manager of the Tallmadge store.

Q. Of what company?
A. Fairlawn Meats.

* * * * * * *

[fol. 190] Q. I will ask you whether or not Plaintiff's Exhibit 12 was presented by you to the employees of the Tallmadge store.

A. Yes, to the extent of, I would say, 95 per cent of them.

Q. Did you understand my question: I asked you whether or not you were the one in that store—having heard Mr. Eker's testimony—that presented this paper to the employees at that store.

A. Yes, sir.

Q. With reference to seeing the signatures on there—actually put on that paper—how many do you say you personally saw put on there?

A. 95 per cent.

Q. Do you recognize the signatures of all the employees on there as being the employees of the Fairlawn Meats, Incorporated, at the Tallmadge store? Are all of those signatures the signatures of employees at the Tallmadge store?

A. Yes, sir.

Q. I hand you what has been marked for identification as Plaintiff's Exhibit 16, and ask you to tell the Court whether or not you recognize the signature of Robert Vargo on that paper.

A. Yes, sir.

Q. Will you state to the Court whether or not you were present when Vargo and the two men who signed as witnesses were present?

A. Yes, sir.

Q. Where was that paper signed?

A. In our office at the Tallmadge store.

Q. And on the date that it purports to bear, March 6th, is that correct?

A. Yes, sir.

Q. I will hand you what has been marked for identifica-
[fol. 191] tion as Plaintiff's Exhibit 17, and ask you to state to the Court whether or not you recognize the signa-

ture at the top of that page as the signature of Don Herbruck?

A. Yes, sir, it is.

Q. Was that signed in your presence?

A. It was.

Q. And in the presence of the two men who appear as witnesses on that paper?

A. Yes, sir.

Q. And where was it signed?

A. In our office at the Tallmadge store.

Q. And on the date that it purports to bear, March 6th, is that right?

A. Yes, sir.

* * * * * * *

Cross examination.

By Mr. Riemer:

Q. I show you Plaintiff's Exhibit 12, Mr. Thursby, and this is the document which you said you presented to the employees.

A. Yes, sir.

Q. Who drafted or dictated the language in type?

* * * * * * *

A. I did, sir.

* * * * * * *

Q. Was it typed in the Tallmadge store?

A. Yes, sir, it was.

Q. And this is your—you signed it, did you not?

A. Number eleven.

Q. Now, what was the manner or method of circulating [fol. 192] this document, Mr. Thursby?

A. I presented that document to each employee, asked them to read it, and then stated if they wanted to sign it they could do so, if not they didn't have to.

Q. Did you walk up and down the market or call them to your office? How did you do that?

A. No, I circulated through the market.

Q. From one employee to another?

A. To wherever they happened to be working.

Q. For instance, Zuchniak, was he the first man you spoke to?

A. Yes, sir.

Q. Zuchniak, he was the first one you spoke to that signed it?

A. Yes, sir.

Q. Is Tallmadge the only place where you circulated this or a similar document?

A. It is the only place I circulated any document.

Q. Mr. Ekers ask you to do this?

A. No, sir. I done that on my own initiative.

Q. Did Mr. Ekers suggest you do it?

A. To my knowledge, Mr. Ekers didn't even know of it until it was almost finished. That wasn't signed all in the same time.

Q. Over what period of time was it signed?

A. In one afternoon and the following morning.

Q. Did you start it on the 10th?

A. Yes, sir.

Q. And you completed it on the 11th of February?

A. Yes, sir.

Q. Had you ever circulated a petition before this in the store amongst employees?

A. No, sir.

[fol. 193] Q. And this was circulated six days after the strike started?

A. That's correct.

. . . . . .

Q. Mr. Thursby, as the manager of the Tallmadge store for plaintiff's corporation, do you, in the performance of [fol. 194] your duties, hire or engage employees?

A. I do.

Q. Do you discharge employees?

A. I have the power; I never have.

Q. You have the authority but you have never exercised it?

A. That's right.

Q. Do you lay off employees?

A. Yes.

Q. Has there ever been an occasion to your knowledge since February, 1952, when you became manager, when you have obtained the resignation of employees?

• • • • • • •

A. Just in this instance where we just had these——

Q. That is the instances as revealed or reflected by Plaintiff's Exhibit 16, pertaining to Vargo?

A. That's right.

Q. And Plaintiff's Exhibit 17, pertaining to Don Herbruck?

A. That's right. That was the only time any one ever left.

• • • • • • •

[fol. 195] Q. Will you tell me, Mr. Thursby, how the occasion arose for Vargo to sign this document? Just relate the circumstances under which that occurred.

• • • • • • •

The Court: Tell the circumstances.

Q. I want to know the circumstances under which Vargo signed this document, Exhibit 16.

A. In order to explain the circumstances of this I have to bring in two or three others.

The Court: Explain the circumstances.

A. On March 6th, which I believe, to my best knowledge, was Saturday, Thomas Tandarich let it be known to Mr. Edward Gerry that he would resign if we so desired, because he had—I believe his statement was—he had joined the Union and didn't want to cause any more trouble than he thought necessary. So I called Tom to the office—I might say Tom was driving truck and I couldn't get in touch with him right that minute—I called Tom to the office, and when he came in I asked him if he wanted to resign.

Mr. Denlinger: This is Tandarich?

The Witness: That's right. And he said yes, if he thought it would keep us out of trouble or do us any good he would resign. At the same time I called Don Herbruck and Robert Vargo to the office——

Q. Excuse me for interrupting. Had Tandarich told you [fol. 196] he had joined the Union?

A. Yes, sir.

Q. And you say he offered to resign?

A. Yes, sir.

Q. Did he do so?

A. Yes, sir. I think you have the paper on that.

Q. Now, following that you say you called Vargo to the office?

A. Yes, sir, Vargo and Herbruck were there together.

Q. You mean they were there when you spoke to Tandarich?

A. No. Tandarich I spoke to by himself. Vargo and Herbruck——

Q. You called both of them to your office?

A. Yes, sir.

Q. Why did you call them to your office?

A. When I have anything to say I never talk to the employees—if I am going to dress down an employee I never do it in front of another employee.

Q. That is understandable. Did you call them to your office to dress them down?

A. No. It was simply the meeting place.

Q. Tell us why you called them to your office.

A. I told them what Tom was going to do and asked them if they so wished to resign—because I heard that they would also resign—wanted to resign.

Q. Now then, you had heard on March 6th that Vargo and Herbruck had joined the Union, isn't that correct?

A. Will you state that again, please?

(Last question read.)

A. That is correct.

Q. When did you first hear that, Mr. Thursby?

[fol. 197] A. You mean what time of the day?

Q. No, I don't care what hour of the day when you first heard it, but what day—when did you first learn that Vargo and Herbruck had either joined the Union or authorized the Union to represent them?

A. That was on March 6th, was the first day I heard it.

Q. Who told you that?

A. Tom Tandarich. Now, I heard this indirectly—Tom told Mr. Gerry and Mr. Gerry told me.

Q. After you had ascertained, or heard in this fashion, that these two boys had joined the Union, you then called them to your office?

A. That's right.

Q. What did you tell them when they got there?

A. I told them I heard they wanted to resign, or would resign, and also told them I heard they had joined the Union, and asked them if they had had any trouble with the company or with myself—any grievance whatsoever. And they both said, no.

Q. Do you have any objection to Union members working in your store?

A. No, sir. I hire Union members.

Q. If you had hired Union members, then why would you ask them to resign?

Mr. Denlinger: I object.

The Court: He may answer that.

A. I asked them to resign because I had heard they wanted to resign. And I also stated when I handed them those papers they could if they wished—they were not being forced to.

* * * * * * *

[fol. 198] Q. Did you type out this legend that appears on this exhibit—that is in the typewritten form?

A. The company secretary did.

* * * * * * *

[fol. 199] Q. And state whether or not you told them on that day, March 6th, that if they resigned from the Union they could come back to work for you?

A. I never made a statement like that.

Q. Now, Vargo—although he signed Plaintiff's Exhibit 16—was subsequently hired back, wasn't he?

A. That's right.

Q. How much later was he hired back, or how soon after was he rehired.

A. As near as I can recall, I believe March 6th was on Saturday.

Q. That's right, it was.

A. He was off all of the next week and Monday of the following week. That's pretty close; I may have missed a day.

Q. Did Vargo come to you and ask to be re-employed?

A. He did, sir.

Q. And you took him back?

A. That's right.

• • • • • • •

Q. Can you tell us what Vargo's hourly rate of pay was [fol. 200] on March 6th, 1954?

A. One dollar an hour.

Q. And when he returned to work for you what was his hourly rate of pay?

A. One dollar an hour.

Q. Has he received any increase since?

A. Yes, sir.

Q. What is it today?

A. I believe it is $1.10 today. I am not positive on that, I couldn't swear to it.

The Court: Did you tell him if he would come back to work for you you would increase his salary?

The Witness: No, sir, I did not.

• • • • • • •

Q. Did you give the raise to Vargo?

A. No, sir.

Q. Who did?

A. I believe Mr. Ekers did.

• • • • • • •

Q. Do you recognize Mr. Speece's signature?

A. I do.

Q. And is that in his handwriting?

A. It is.

Q. And everything on that exhibit is in the handwriting of Mr. Speece himself?

A. Yes, it is all except——

Q. Except the stenographer's notes. And that is dated approximately February 22nd, it appears to be?

A. Yes, I would say so.

• • • • • • •

[fol. 201] WILLIAM H. BRIGHAM, called by the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Denlinger:

• • • • • • •

Q. Where do you work?

A. Fairlawn Meats, Incorporated.

• • • • • • •

[fol. 202] Q. What store do you work?

A. West Market Street.

Q. That is the store that has leased space in the Sparkle Market, at the intersection of West Market and Sand Run Road?

A. Yes, sir.

Q. You have worked there continuously since that store opened?

A. I have.

Q. Were you working there in February, 1954?

A. I was.

Q. I will hand you what has been marked for the purpose of identification as Plaintiff's Exhibit 13, and ask you whether or not your name appears on that page.

A. My name is number 5 on this page.

Q. I will ask you to tell the Court what, if anything, you did to have this circulation of that paper among the employees of the West Market Street store of the plaintiff?

A. I called my employees together, I put the paper on the table we had in the working area there, and I told them

if they cared to sign it they were to do so, if they didn't care to sign it, not to do so.

Q. How many employees at West Market Street store?

A. Including myself there are five full-time employees.

Q. How many full-time and part-time?

A. There are four—well, nine all together.

Q. Four extras?

A. That's right.

Q. How many of the employees signed?

A. Eight.

Q. Who was the ninth one that didn't sign?

A. Pardon me, sir. I have only seven names here.

Q. And who didn't sign?

A. Marietta Channell.

Q. Channell?

A. That's right.

[fol. 203] Q. Is she still working there?

A. Yes, sir.

Q. Has she worked there continuously?

A. She missed one day, the day of the strike, February 4th.

Q. She was off on that day?

A. One day.

. . . . . .

Q. Tell the Court what you saw Frank Samino do with reference to Mrs. Channel.

A. They got in the car.

Q. Did they take her to their car?

A. Yes.

Q. What happened after that?

A. That I didn't follow.

Q. Did they drive away?

A. They drove away.

Q. And following that she didn't come to work on that day?

A. She didn't come to work on that day.

Q. Did she come the next day?

A. Yes, sir.

Q. And she has been working regularly ever since?

A. Excepting a few days she was off, sick.

. . . . . .

[fol. 204] Q. Referring particularly to No. 7, Max Krausman, tell the Court what you saw happen with reference to him the morning of February 4th, as it has to do with the defendant Union in this case.

A. On February 4th, on the morning of the strike, he drove his car into our parking lot in the usual manner. Instead of coming to the front door and coming in, he went around to the back door. Since there is quite a difference of space between the front and back we didn't hear him knock, so the last I saw of Mr. Krausman he was driving out of the parking lot.

Q. On that day?

A. Yes, sir.

Q. Did he later return to work?

A. Not to work. He came in the following morning, onto the parking lot.

. . . . . .

Q. Is he now working?

A. Yes, sir.

Q. And regularly, at the West Market Street store?

A. Yes, sir.

Q. And subsequent to not working he signed the paper you hold in your hand?

A. Yes, sir.

. . . . . .

Cross-examination.

By Mr. Riemer:

Q. Where did you get that document, Exhibit 13?

A. Mr. Ekers gave me the document out at the West [fol. 205] Market Street store.

Q. Did he give it to you on the date it bears, February 10th?

A. I can't honestly answer that question, but it was in that area, yes.

Q. And that was the form in which you received it?

A. That's right.

Q. And you say you called your employees together?

A. That's right.

Q. Who is Eugene B. Moyer, signature number 1?
A. He doesn't work at my store.
Q. Was his signature on it when you got it?
A. I believe it was, but I can't recall.
Q. Eugene B. Moyer was the bookkeeper?
A. Yes, sir.
Q. You think he had already signed it when you got hold of it?
A. Yes, sir. Our names start right here—number 4.
Q. Who is Hurst?
A. That I don't know.
Q. Who is Miller?
A. He doesn't work at Market Street.
Q. Is Paul Levine the first signature of a Market Street employee?
A. That's right.
Q. Number 4. On February 10th, or on or about February 10th, 1954, when Exhibit 13 was circulated by you, Marietta Channel was not working that day, was she?
A. I believe she was working with the store.
Q. She didn't sign it, did she?
A. No, sir.
Q. Did she refuse to sign it?
A. She said she would rather not sign it due to the fact that her husband is employed by the Rubber Company [fol. 206] and does belong to a Union.

* * * * * * *

[fol. 207] EUGENE B. MOYER, called by the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Denlinger:

Q. Your full name is 'Gene Moyer?
A. That's right.
Q. You testified this morning on cross-examination, Mr. Moyer?
A. I did, sir.

Q. I will hand you a paper marked Plaintiff's Exhibit 13, and I will ask you if that is your signature, number 1 on that page.

A. It is, sir.

Q. I will ask you whether or not you circulated that paper among the employees at the West Richfield store where you are manager.

A. That is right, sir.

Q. And what employees of West Richfield signed?

A. Robert W. Hurst, Cecil L. Miller.

Q. Those two gentlemen signed in your presence?

A. Yes, sir.

Q. And after reading at the top of the page?

A. That's right sir.

• • • • • • •

[fol. 208] OFFERS IN EVIDENCE

Mr. Denlinger: If your Honor please, I would like to offer in evidence all of the exhibits of plaintiff, from Exhibit 1 to——

The Court: You have some too, don't you, Mr. Riemer?

Mr. Riemer: Yes, sir.

Mr. Denlinger: Plaintiff's Exhibit 1 is the Stipulation. May it be admitted?

Mr. Riemer: No objection.

The Court: It may be admitted.

Mr. Denlinger: Exhibit 2-A and 2-B is the standard contract.

The Court: It may be admitted.

Mr. Denlinger: Exhibit 3 is a photograph.

The Court: It may be admitted.

Mr. Denlinger: Exhibit 4 is the photograph at West Richfield.

The Court: It may be admitted.

Mr. Denlinger: Exhibit 5 is the resignation of Thomas Tandarich.

Mr. Riemer: That I do object to, your Honor.

The Court: He hasn't testified, has he?

Mr. Denlinger: He testified personally, yes.

The Court: All right. That may go in.

[fol. 209] Mr. Denlinger: Exhibit 10, your Honor, is the letter from Earl C. Gibbs, Incorporated, to Mrs. Ekers, that you said would be accepted.

The Court: That may be accepted only for the specific purpose I have already indicated.

• • • • • • •

[fol. 210] MOTION TO DISMISS PETITION AND VACATE RESTRAINING ORDER AND DENIAL THEREOF

Mr. Riemer: May it please the Court, at this time I move to dismiss the petition and to vacate the temporary restraining order heretofore issued by Judge Wanamaker, on the ground that the plaintiff has failed to sustain the burden of proof and to state a case entitling it to the relief sought.

The Court: Overruled.

Mr. Riemer: Exception.

• • • • • • •

[fol. 211] SAM POLLOCK, called by the defendants, having been heretofore duly sworn, testified as follows:

Direct examination.

By Mr. Riemer:

• • • • • • •

Q. Mr. Pollock, you are the defendant in this action and President of Local No. 427 Union?

A. Yes.

• • • • • • •

[fol. 212] Q. In Akron it is the Local as a branch—is that what it is called?

A. Section.

• • • • • • •

Q. Does the Akron branch confine itself to all of Summit County or is it just the City of Akron or the metropolitan area?

A. Covers all of Summit and Portage counties.

. . . . . .

[fol. 213] Q. Now, coming down more specifically to the precise issues in this case, Mr. Pollock. Can you now tell us when it was that you first met with Mr. Ekers, the secretary of the plaintiff corporation?

A. The first time was in May of 1952.

Q. 1952?

A. Yes. It was just a brief meeting, that was the only time that I met with him in that period.

Q. I didn't know that. Now that you have mentioned it will you state very briefly what occurred then?

A. Merely that we discussed at that time the matter of an agreement, and I suggested that possibly Mr. Ekers could—in order to expedite matters and to give us time to negotiate with him—that he recognize the Union for collective bargaining purposes, and then we would proceed to negotiate an agreement with him at a subsequent period. And that was the nature of the——

Q. Was that before or after the Stipulation, which is Plaintiff's Exhibit 1, was executed?

A. That was before the Stipulation.

The Court: What time was that?

The Witness: In may.

Mr. Riemer: 1952.

The Court: Is that the first time you talked to him?

The Witness: Yes, that's the first time. Just briefly.

Q. And you say that was before Plaintiff's Exhibit 1 [fol. 214] was signed?

A. That's right.

. . . . . .

[fol. 214a] Q. Now can you tell us briefly what you said to Mr. Ekers and what he said to you on the occasion of the first meeting, October, 1953?

A. Well, we discussed the matter of negotiating an agree-

ment. We asked Mr. Ekers to consider the Union's agreements in effect in the Akron area, to look them over and to try to determine where he could meet the conditions, and if he had any problems relative to the recommended agreement that we would certainly be glad to discuss with him his problems and see if we could do something to work those out so that we could have an agreement with Mr. Ekers comparable to that we have in the industry.

Q. At that time, Mr. Pollock, did Mr. Ekers have with him the proposed agreement that had been handed to him by Mr. Dougherty, do you know?

A. I don't recall. I don't think so.

Q. You mentioned this first meeting in October, 1953. Can you tell us, without refreshing your recollection with any notes or minutes you may have kept, how many meetings were held after that first one in October, 1953?

A. I would say about six or seven meetings were held.

Q. Down to the——

A. The last meeting on February 3rd.

Q. February 3rd, 1954?

A. February 3rd, 1954.

Q. Six or seven additional meetings, including the one held February 3rd?

A. That is right.

Q. Where were those meetings held, the others?

A. As I recall, most of these meetings were held in Cleveland at Mr. Ekers' convenience. We held one meet-
[fol. 214b] ing in Akron.

Q. Where was that?

A. Our Union office in Akron, 31 North Summit Street.

Q. Was Mr. Ekers at the Union office?

A. Yes.

Q. Without going again into detail of each meeting—these six or seven you mentioned—can you state substantially the content of those meetings—what was said to Mr. Ekers by you and what Mr. Ekers said to you?

A. Most of our conversation in these meetings dealt with economic question. Mr. Ekers posed several problems that he had.

Q. What were those problems that concerned Mr. Ekers, as he stated them to you.

A. One problem was the fact that in the West Market

store he leased space there, and the hours of operation for him in that store were governed by the hours of operation of the owners of the food store, and that he could not see his way to closing up Sunday, although he wished he could, but he couldn't see his way clear to doing that, and wondered what could be done about that sort of a situation.

Q. Did you have any suggestion for meeting that?

A. I think we had made several suggestions in relation to it. One was on a basis of maintaining a minimum—you know—force there, having all meat cut and prepared during the week days, and just having the meat all ready in the cases, thus to minimize the amount of help he would need on Sunday to wait on trade and reduce whatever premium and costs there was. The other suggestion was we thought he might work it out on a basis so that regular full-time help would not — required to work on [fol. 214c] Sundays, and if they could work it out on a basis of part-time help, coming into the store on Sunday and wait on trade—that possibly for the purpose of that market might waive the double-time or part-time help.

Q. You mentioned that problem. Any other problems he raised and which were discussed?

A. Yes, he raised the pay problem, the wage problem.

Q. The hourly rate of pay?

A. The hourly rate of pay.

Q. Did you discuss that with him?

A. Yes.

Q. What was Mr. Ekers' problem on the hourly rate of pay?

A. As he presented it to me, he said some of the help he obtained—he had to obtain because he had no other choice in the matter—and that not all this help was competent or able to do the work he hired them for, and he couldn't see his way clear to giving them more money because they weren't able to produce even for the wages that he was paying them, and that he felt in some instances he had help there—two help to do the work of one.

Q. You mean two employees?

A. Two employees to do the work of one. So we told him we recognized that problem—that probably he had that problem, and we were certainly willing to work along

with him to try to—if he wanted to—to help him get competent help, and if we were unable to do that that possibly we could work something out on individuals who were unable to perform completely or fully the requirements of the job for which a pay rate is set, and waive the rate on them until such time as they met the qualifications or that replacements would come in fully qualified to do it, [fol. 215] in which case the labor for the individual would go up to the full terms of the agreement for that classification—whatever the rate was would then apply.

Q. Were there any other problems discussed?

A. One of the problems that Mr. Ekers discussed with us was his problem that his wage costs were running too high. He didn't state where they were running too high.

• • • • • • •

A. He told me his wage costs were running too high in relation to the volume of business he was doing. I said "That is possible, that could happen. But it has been our experience with our agreements that when these conditions are established—that once the rate of pay for the job is established that the people then were fully expected to qualify and do the work; that failing to meet the standards—both established by the Union of what competent workmanship is and as to the needs of the employer—that certainly we wouldn't stand in his way of making whatever changes would be necessary to put himself in a more profitable relationship." We also pointed out that the wages in our standard agreement with employers—overall wage costs—apparently were less than what Mr. Ekers' wage costs were. But that is a problem of management, not a problem for the Unions to solve, except to assist in getting competent help—or in emphasizing that the people, [fol. 216] once they get the rate—the job of keeping that job is up to the member—the Union can't hold the job for them, they can only negotiate the terms, then it is up to the member to qualify and hold that job.

Q. During those discussions—the six or seven meetings you had with Mr. Ekers, did you, in form or substance, negotiate the specific terms of any of the clauses of that agreement that had been submitted to him by Mr. Dougherty? Do you understand my question?

A. Could I have it repeated?

(Last question above read.)

A. I don't recall ever discussing any specific paragraph provision in our agreements. We discussed merely the problems raised by Mr. Ekers.

Q. Was the question of the Union shop or Union security raised by Mr. Ekers?

A. Yes, that problem was raised, but in all of our discussions it was pretty much incidental to the general discussion of wage costs, costs of operation and specific application of the premium pay for Sunday work, and so on.

Q. I would like to ask you again, did you discuss with Mr. Ekers, or did he raise, the question of the specific language of the Union shop clause in the contract that had been submitted to him?

A. No.

Q. Was there anything said at any of those meetings about the application of a Union shop, in principle or in fact?

A. There was discussion as to the application of the Union shop principle—in principle, I guess.

[fol. 217] Q. Is it then your testimony, Mr. Pollock, that the principal items which were the subject of discussion at these various meetings were the economic problems such as you have mentioned?

A. That was certainly my impression of all our discussions—that the major problem was economic.

* * * * * * *

Q. Will you tell us what transpired at this meeting in your office on the date of February 3rd in your presence, what did you say to Ekers and what did Ekers say to you?

[fol. 218] A. I asked Mr. Ekers whether he was going to sit down and work out the specific terms of the agreement with the Union. His answer was: "I don't care to negotiate a contract now. I am leaving the door open though, but I don't want to negotiate a contract now." I stated: "Well, you understand that this answer is unsatisfactory. We have to know where we are going with this thing." And Mr. Ekers said: "I fully appreciate

your position, but I don't want to negotiate a contract now—maybe later, but not now." I asked him to continue to meet with us, you know, to work out the terms of the contract. And substantially received the same answer: "I don't care to negotiate a contract now."

Q. Did Mr. Ekers, in the conversation, give you any reason why he didn't care to negotiate a contract now?

A. He said that he had held a meeting with his members —I mean with his employees—Monday evening, and that from his talk with them they didn't want him to sign a contract with the Union.

Q. Was there anything said at that time—that is, in your office on February 3rd—about the Union shop?

A. I can't recall. There was discussion about the attitude of some of his employees toward the Union—that they didn't want to join the Union. But I don't recall whether we discussed the Union shop as such. I know that I asked him to continue—and what I attempted to do all through that session—in our discussions with Mr. Ekers—was not to give us a "no" answer but to continue in negotiations with us with the hope we could resolve all the questions at some subsequent period. We were not [fol. 219] pressing him at any time to sign the contract immediately, we asked that he sit down and discuss the individual provisions of the contract, and it was that that he was answering to: "I don't care to negotiate now."

. . . . . .

Q. Before that meeting concluded was there anything said to Mr. Ekers about a strike?

A. Yes.

. . . . . .

[fol. 220] Q. Now, the next morning was February 4th, 1954. And what occurred on that day in so far as your relations with Mr. Ekers were concerned?

A. Strike was called. People were notified the night before, following our meeting with Mr. Ekers, that under the authority of the Union the officers were calling a strike to start February 4th. Mr. Jim Dougherty was instructed to advise the people to that effect. And on Feb-

ruary 4th picket lines were established at West Richfield, West Market and Tallmadge.

Q. Were the picket lines established simultaneously at all three operations, if you know?

A. Might be considered simultaneously. They were established first at Tallmadge and then about an hour or so later, as I recall.

• • • • • • •

[fol. 221] Q. Can you tell us, without reference to those records, how many employees the Union represented at the time the strike was called on February 4th, 1954?

• • • • • • •

[fol. 222] A. At the time of the strike?

Q. February 4th, 1954.

A. Eighteen.

Q. And those eighteen individuals were employed by the plaintiff-corporation?

A. Yes.

The Court: That is at the time the strike was called?

The Witness: Yes.

Q. Now, did all of those eighteen individuals go out there on strike, Mr. Pollock, in the sense that I now use the word—by a physical participation in the picket line?

A. No.

Q. At West Richfield can you tell us how many of the employees physically participated in the picket line?

A. Five.

Q. Has that figure changed—either decreased or increased—since February 4th, 1954, and down to date?

A. Increased.

Q. Now, at West Market Street on the morning of February 4th——

The Court: Pardon me. You said increased. To what extent?

The Witness: The extent that the two part-time—who were not scheduled to work on the day the strike was called—subsequently signed with the Union and then remained out on strike.

The Court: Plus the five?

[fol. 223] The Witness: Plus the five.

Q. Were those two part-timers employed at West Richfield, Mr. Pollock?

A. Yes.

Q. Now, at West Market Street, Mr. Pollock, did any of the employees at West Market street picket?

A. Actually picket—no.

Q. That was what I asked you,—no—if they did picket, and your answer is no. Did any of those employees represented by the Union at West Market Street participate in the strike? You can answer that by yes or no.

A. Yes.

Q. Will you tell us the extent or nature of their participation?

A. They remained away from work.

Q. Two employees, did you say?

A. Two employees.

Q. How long did they remain away from work?

A. As I recall they remained away until the 11th.

Q. Of February?

A. Of February.

Q. Do you know the names of those two employees?

A. Marietta Channel and Max Krausman.

Q. Now addressing your attention to Tallmadge. When the strike started on February 4th did any of the Tallmadge employees, represented by the Union, picket?

A. No.

Q. Subsequent to February 4th, 1954, did any of the employees represented by the Union participate in the strike at Tallmadge?

A. Yes.

Q. Can you tell us the nature of that participation? What did they do, in other words?

A. Well, two stayed away from work—wouldn't go in to work—that was Speece and Carpenter. Subsequent to them staying out several of the full-time employees came [fol. 224] out on strike. They were not all on the same da[illegible]—I don't recall the precise dates—but they were Rodocker, Mayo—that is Helen Mayo and David Rodocker —Digger O'Dell—Therom I believe.

Q. Digger is Therom?
A. Thérom, yes.
Q. And Digger is his nick-name?
A. Yes. And Tom Tandarich, Don Herbruck.

. . . . . .

[fol. 225] Q. In your presence and while you were there, will you tell the Court where you saw pickets walking?

. . . . . .

A. My observation was that the picketing involved two at each of the driveways, approximately five foot from the curb side. Occasionally, if the pickets dropped below two per driveway, the picketing then continued with one or two for the entire store on the devil strip within three to four feet of the curb line between the driveways.

Q. You use the phrase "devil strip", with which I am not familiar. Is that what I would call the tree lawn?

A. Generally speaking, I have reference to the dirt—uncovered—you know—uncovered strip of ground between the sidewalk and the curb line.

Mr. Riemer: Does the Court understand what is meant by a "devil strip"?

The Court: That is my expression of it.

Mr. Denlinger: Just a moment. There is no sidewalk out at Tallmadge.

The Court: It means where the sidewalk would normally be. He is just describing what he means by devil strip.

Q. Mr. Pollock, I will show you a photograph marked Defendants' Exhibit 19. Do you recognize it?

A. Yes.

Q. Did you take that photograph?

A. Yes.

[fol. 226] Q. Will you describe it, please, or identify that photograph.

A. This photograph was taken March 6th at Tallmadge —at the Tallmadge store.

Q. What is shown on that photograph?

A. What is shown on that photograph are two pickets

on the upper drive, or the north drive, and two pickets on the south driveway.

Q. That is, two pickets on this photograph are walking in the north drive entrance into the Tallmadge operation, are they?

A. That's right.

Mr. Riemer: Does the Court wish to see them. (Hand-Defendants' Exhibit 19 to the Court)

Q. I hand you Defendants' Exhibit 20, Mr. Pollock. Do you recognize that?

A. Yes.

Q. Was that photograph taken by you?

A. Yes.

Q. What drive is shown in that photograph?

A. The south drive at the Tallmadge store.

Q. That is the other drive from the one shown in Defendants' Exhibit 19. Right?

A. Yes.

Q. Can you identify those two pickets?

A. Helen Mayo and David Rodocker.

Q. Employees of the plaintiff-corporation?

A. Yes.

* * * * * * *

[fol. 227] The Court: Regardless of whether he consented or not, if they were trespassers they were still trespassers. Do you want to proffer the answer?

Mr. Riemer: I make offer of proof to this extent: if the witness were permitted to testify without objection in response to the question as to what arrangements he made with city officials prior to the picketing at Tallmadge, in response to such question he would say that he consulted Mayor Orr and the Chief of Police, and they, in response to questions from Mr. Pollock, said they would permit them to picket along the area identified by Mr. Pollock as the devil strip. I believe that name is correct—Mayor Orr?

The Witness: Yes.

Mr. Riemer: As part of the offer of proof may I ask the name of the Chief of Police. Do you know that name?

The Court: Yes.

A. Yes. Sam Andrews.

Q. Now, Mr. Pollock, addressing your attention to Market Street just very briefly. Mr. Pollock, very quickly, I hand you Defendants' Exhibit 21. Do you recognize that photograph?

A. Yes.

Q. Did you take it?

A. Yes.

Q. Does that show the Plaintiff-Corporation's operation on West Market Street?

A. Yes.

Q. Does that show the area outside the store?

[fol. 228] A. Yes.

Q. Showing you Defendants' Exhibit 22, is that another photograph of the same location?

A. Yes.

Q. Did you take it?

A. Yes.

Q. And that photograph shows a picket?

A. Yes.

Q. Can you identify the picket?

A. No.

Q. Well, whether you can identify him or not, he is carrying one of your cardboard aprons. Is that right?

A. Yes.

Q. Mr. Pollock, I show you Defendants' Exhibit 23. Will you identify that.

A. This is the location at the West Richfield store.

Q. Looking in what direction?

A. Looking from the second floor—that is, the second story of Mr. Ekers' store.

Q. Looking west, in other words. Substantially west?

A. Looking west, yes.

Q. Across the road?

A. Yes.

Q. That is the area in the dark gray foreground, that is the area in front of the store?

A. Yes.

Q. And the light area running diagonally is the state highway?

A. Route 21.

• • • • • • •

[fol. 229] Q. Do you know the individual in the apron there, standing at the car? If you know, Mr. Pollock.

A. I can't say definitely. (Examining exhibit 23.) I think I know who it is but——

Q. I don't think the Court will take that——.

A. It is one of the employees of the store.

Q. Did you ever observe yourself the picketing at West Market Street?

A. Very briefly.

Q. Well, to the extent you did, and in your presence, can you tell the Court where you observed the pickets walking at West Market Street?

A. I observed one picket only at West Market, in the east driveway of the west Market Street store.

Q. Is that, Mr. Pollock, in the area known to be occupied by the picket in Defendant's Exhibit 22?

A. Yes. This is the east driveway.

Q. Can you tell us, from your observation, the approximate distance separating this picket from the curb?

A. About six feet.

Q. Now, you did, from time to time, observe picketing at West Richfield, did you not?

A. Yes.

Q. And in your presence and under your observation can you tell the Court the position occupied or taken by the walking pickets at West Richfield?

A. When they were walking they were on the north of [fol. 230] the store approximately five—six feet from the curb, or where the curb would be.

Q. Now, with reference to Defendants' Exhibit 23, you have used the expression "where the curb would be." Is that the irregular line, let's say, that separates the light gray highway from the dark gray foreground?

A. Yes.

Q. Is that your opinion of where the curb would be?

A. Yes.

Q. Do you know the approximate distance between the highway and this either telegraph pole or light pole?

A. Approximately 7—8 feet.

* * * * * * *

[fol. 231] Q. Mr. Pollock, I show you what has been marked Defendants' Exhibit 24, that is a photograph. Did you take that picture?

A. Yes.

Q. Can you identify it, please?

A. It was a photograph of the store and plant of the Fairlawn Meats at West Richfield, Ohio.

Q. And that is looking east from the road?

A. That is looking east from the road.

. . . . . .

Cross-examination.

By Mr. Denlinger:

. . . . . .

[fol. 232] Q. You are a paid employee of the International Union?

A. I am a paid employee of Meat Cutters Local Union No. 427.

. . . . . .

Q. How long have you been business agent or president of Local Union of the Meat Cutters?

. . . . . .

[fol. 233] A. Since May 13th or May 12th, 1953.

Q. Prior to that what was your business?

A. Prior to that I was International representative——

Q. You were then on the payroll of the International Union?

A. At that time, yes.

. . . . . .

[fol. 234] Q. You have never been in the meat business?

. . . . . .

The Court: Were you the owner of a meat business?

The Witness: No.

. . . . . .

[fol. 235] Q. Now, part of this uniformity that you speak of in your direct testimony—you mean uniformity as to everybody belonging to the Union, don't you?

A. We mean uniformity as to wages, hours, and working conditions.

Q. And as a part of the working conditions, as a condition of his employment, he must be a member of the Union?

A. After thirty days they make application in our organization for membership.

Q. And it is compulsory that they belong?

A. If he has been there thirty days or more.

* * * * * * * *

[fol. 236] Q. As a policy of Local No. 427, and you as its president and business agent, consider the uniformity that you spoke of in your direct testimony to apply to the requiring of every one who works in a butcher shop in Summit County to belong to the Butchers Union, is that right?

A. At the present time all of our agreements that I can recall provide for the Union shop provision—Union security.

Q. There is no contract in effect with any of the employers you have mentioned that does not require all their employees to belong to your Union as a condition of working there?

A. I recall we have one agreement they are not required.

Q. What agreement is that?

A. That is with the Armour branch house contract right in Akron. That contract provides for maintenance of membership. If they voluntarily join they continue their membership in good standing. If they join—at any time they join they can continue their membership in good standing. But they are not required to be a member of the Union as a condition of employemnt.

Q. Is that the only contract in Akron to that effect?

[fol. 237] A. Contract with Parker.

Q. How many employees does Parker have?

A. Mr. Parker has two markets in the Akron area.

Q. How many employees in the meat busines?

Mr. Riemer: Let him finish, Mr. Denlinger.

Q. That was my question.

A. I would say about seventeen, of which seven are members and ten are not.

Q. Any others?

A. I can't recall any others.

Q. With reference to Armour, why have you made an exception there?

Mr. Riemer: Object.

The Court: He may answer that.

A. Well, that is the way the course of our negotiations have gone with the Armour branch house.

Q. That is because of your national contract with them?

A. No, it is a local agreement with the Armour branch. The branch houses come under local agreements, they do not come under the national agreement we have.

• • • • • • •

[fol. 238] Q. You first met Mr. Ekers in 1952, is that right?

A. Yes.

Q. And the very first time you talked to him—I think I got you correctly here—I want you to correct it if I [fol. 239] didn't—you told him that in order to expedite matters you desired him to recognize your Union as the sole bargaining agent, didn't you?

A. Yes.

Q. How many members did you have at that time?

A. I don't know.

Q. Can't you give us an idea?

A. No, I can't give you an idea because I wasn't familiar with the membership rolls at that time.

Q. When did you first become familiar with the membership rolls of Local No. 427, as to employees at Ekers?

A. After I became president of Local Union No. 427.

Q. When was that?

A. May, 1953.

• • • • • • •

Q. And what employees of Ekers, in number, did you have at that time?

A. I don't recall at that time.

Q. Can't you give us an idea?
A. No, I can't give you an idea.

• • • • • • •

Q. Was it as many as five?
A. I don't know.
Q. Have you any idea?
A. No.
Q. Was it a majority?
A. I don't know, not at that time.
Q. Have you ever had a majority?
A. I believe we have.
Q. When?
A. I believe we had a majority at the time of the strike.
[fol. 240] Q. How many employees did he have at the time of the strike in this Union?

Mr. Riemer: May I interpose this objection, and I will state my reasons for it and abide by the ruling of the Court. I am going to object to any questions designed to ferret out from this witness whether we did or did not have or represent a majority of the employees at the time the strike started on February 4th, 1954. I say it is for this reason: we are not going to conduct a Labor Board election, that this matter, and our right to peacefully picket, it not conditioned upon our ability to prove a majority, nor do I say the Court's authority to issue an injunction is based upon our inability to prove such a majority. Certainly we have a right to bargain for these people whom we do represent. And if the people we do represent are negotiating in a bona fide labor dispute through their representative with an employer, then we say we have a right to strike, provided again—I am assuming in all this—that our conduct is peaceful and lawful in manner. Whether we had possession of a numerical majority is not in issue.

The Court: I believe the Court is entitled to have a complete picture. You may answer. Objection overruled.

A. At the time of the strike I believe it was a majority.

Mr. Denlinger (To reporter.) Read the question, please.

(Question at top of this page read.)

A. How many employees?

Q. How many of Ekers' employees were eligible to membership in your Union at the time of the strike?

[fol. 241] A. I don't know.

Q. You have no idea?

A. Well, at the time of the strike we had an idea as to the number of people employed in Ekers.

Q. How many was that?

A. That——

Q. How much was that?

A. —we estimated around thirty-five.

Q. Don't you know it was more than fifty?

A. No, I didn't know it.

Q. How many employees have authorized you to represent them at the time of the strike?

A. As I recall there were eighteen authorizations.

Q. When were those authorizations signed?

A. Over a period of time.

Q. When was the last one signed before you went on strike?

A. I can't recall the exact date.

Q. You have the list of those people?

A. Yes.

Q. Will you produce it?

A. Yes.

(Witness produces the list requested.)

. . . . . .

[fol. 242] Q. Let me put it this way: how many members of your Local Union No. 427 are now participating in any manner in this strike, and will you name them at this time?

A. Well, one, two, three——

Q. Name them.

A. Smith, Rodocker, O'Dell, Horn, Guthrie, Conley, Minto, Leroy Smith, Delbert Brown, Helen Mayo, Thomas Tandarich, Don Herbruck, Walter Carpenter, Speece.

Q. In what respect are Tandarich, Herbruck, Carpenter [fol. 243] and Speece participating in this strike?

A. They came to us and told us they came out on strike in support of the Union's demands.

Q. I am talking about now. What are they doing now?

A. Tandarich, as I understand it, is picketing now—he's on strike.

Q. Do you know that he has resigned?

A. I saw a resignation you produced here.

Q. You heard him testify, didn't you?

A. Yes.

Q. And you say he is picketing?

A. Yes.

Q. Is he on the payroll of the Union?

A. No.

Q. Are you paying strike benefits to these strikers?

A. Yes.

Q. All of them?

A. Yes.

* * * * * * *

[fol. 244] Q. I believe you said you didn't know how many employees of Mr. Ekers you represented—that when you first saw him in May—and that you don't now recall, even when you became president of the Local Union, how many members you had?

A. I assume we represented members for the purpose of bargaining.

Q. How many?

A. I don't know. I'm sorry; I wish I could tell you.

* * * * * * *

[fol. 245] Q. On whose property have you been picketing at Tallmadge?

Mr. Riemer: Object.

Q. Do you know?

The Court: If he knows.

A. I don't know.

* * * * * * *

[fol. 246] Q. Do you know on whose property you are picketing at West Richfield?

A. I did not know we were picketing on anybody's property in West Richfield.

Q. You know that somebody owns the property in West Richfield.

A. It was our belief——

Q. Answer my question.

A. I believed that I was picketing, when I picketed, on a strip of ground that the public had access to. That was my belief and that was my understanding.

Q. Just a minute.

The Court: Strike that. Read the question.

(Question read as follows: You know somebody owns the property in West Richfield.)

Q. Don't you?

A. I said I believed that piece of property belonged to the State.

Q. You know that somebody owns it, don't you?

A. Yes, I assume somebody owns it.

Q. Who owns it, if you know?

A. I don't know. I assume——

Q. Don't assume anything. Answer my question. You don't know?

A. I don't know.

* * * * * * *

[fol. 247] Redirect examination.

By Mr. Riemer:

Q. Mr. Pollock, I show you this document which Mr. Denlinger used in questioning you. Will you state what this is? (Indicating Defendants' Exhibit 25.)

A. This is a list of the members, their addresses, the stores they worked in, the date they joined the Union, and the day they came out on strike.

Q. Did you prepare this or was it prepared under your direction?

A. Prepared under my direction.

Q. In the first column what do we have?

A. The names of those who signed up with the Union.

Q. And the second column.

A. Their home address and phone numbers, if available.

Q. And the fourth column is "Sex."

A. Yes.

Q. And place of employment is the fifth column?

A. Yes.

Q. I notice you have "Tallmadge, West Richfield and Market Street." That indicated the market where the individual was employed?

A. Yes.

. . . . . .

[fol. 248] Q. Mr. Pollock, just another question or two about this document, Defendants' Exhibit 25. The last column, under the legend: "Date went on Strike," appear certain dates. What are those dates?

A. Those are the dates that those that went on strike—the dates they went on strike.

Q. For example, opposite the name "Robert Hurst" there is a clause, "Stayed in." What would that mean?

A. That means in substance that he didn't come out on strike.

Q. Mr. Pollock, do you know part-time employees by the name of John Zepka and Ted Groza?

A. No, I don't know them.

Q. Prior to the hearing on the temporary application before Judge Wanamaker, Mr. Pollock, have you ever seen or been shown a payroll list of names of the plaintiff's employees?

A. A payroll and list of names——

Q. No. Listen to my question, please. Before the hearing on the temporary application, which came on before Judge Wanamaker, had you ever seen a company payroll showing the names of the employees?

A. No.

. . . . . .

[fol. 249] Recross examination.

By Mr. Denlinger:

. . . . . .

Q. One other thing, did you ever at any time, in your several conversations with Mr. Ekers, take up with him

any grievance of any employee regarding any subject of employment?

A. I don't recall of any.

Q. Did you hear Mr. Dougherty at any time present any question to Mr. Ekers of that nature?

A. I don't recall, no.

* * * * * * *

[fol. 250] DAVID RODOCKER, called by the defendants, being first duly sworn, testified as follows:

Direct examination.

By Mr. Riemer:

* * * * * * *

Q. Mr. Rodocker, are you a member of the Union?

A. Yes, I am.

Q. When were you first employed by the plaintiff—withdraw that——

[fol. 251] I don't think that I have established that you were. Are you an employee of the plaintff-corporation?

A. I am.

Q. When were you hired?

A. The first day in November, 1952.

Q. And have you been on strike?

A. Yes, sir.

Q. Since on or about when?

A. On or about the 19th or 20th of February.

Q. From 1952, the time you were hired, down to the time you went on strike, Mr. Rodocker, what was your job with the plaintiff?

A. Well, wholesale journeyman meat cutter.

Q. You say wholesale journeyman meat cutter?

A. Yes, sir.

Q. Will you give us a little more detail on your job and its duties?

A. I cut meat for the restaurants, hotels and lockers, accepted meat, signed bills and—well——

Q. How would you function? Did you get an order from your supervisor to cut certain meats?

A. It was on a bill—they wrote the orders on the bills, I picked up the bills and went from there.

Q. And you say these were for hotels?

A. Hotels, restaurants——

Q. What hotels?

A. Akron Hotel, Portage Hotel.

Q. Mayflower?

A. I don't recall the Mayflower, no, sir.

Q. For restaurants?

A. Yes, sir.

Q. Are those restaurants in the metropolitan Akron area?

A. Yes, sir. And also organizations.

Q. What do you mean by "organizations?"

[fol. 252] A. Like YW and YM and so on.

* * * * * * *

[fol. 253] Q. Now, there has been some testimony, Mr. Rodocker, of a meeting that was held at Leon't Tavern [fol. 254] on the night of February 1st, 1954. Did you attend that meeting?

A. Yes, sir.

Q. Will you relate how it happened that you went to that meeting?

A. Yes, sir.

Q. How did it happen?

A. That afternoon either Mr. Thursby or Mr. Gerry came up to me and told me they was having a meeting at Leon's Tavern and would like for me to be there.

Q. Had there ever been a previous occasion when Mr. Ekers had called a meeting in Leon's Tavern, or any other tavern, of employees?

A. I think there was one other meeting; I'm not sure.

* * * * * * *

Q. Did you go to any other meeting?

A. I went to about all the parties and meetings he has had.

* * * * * * *

Q. In any event, you went to this meeting on February 1st, 1954?

A. Yes, sir, I did.

Q. And approximately how many people were there?

A. I would say approximately twelve—fourteen people.

Q. Were they all Ekers' employees?

A. Yes, sir.

Q. Was Mr. Thursby there?

A. Yes.

Q. Leroy?

A. Yes, sir.

Q. Salesman there?

A. Which one?

Q. The company salesman.

A. Yes, sir.

Q. State whether or not Mr. Ekers provided any liquid [fol. 255] refreshment or drinks for the people that went to that meeting?

A. He did.

Q. Did you yourself have anything to drink?

A. Yes, sir.

Q. How many round- were provided?

A. As near as I can remember, there was two rounds.

Q. Did you pay for your drinks?

A. No, sir.

Q. Do you know if the other employees paid for theirs?

A. To my knowledge they did not.

Q. To your knowledge who did pay for them?

A. Mr. Ekers.

Q. Did you attend throughout the entire meeting?

A. Yes, sir.

Q. Did Mr. Ekers speak?

A. Yes, sir, he did.

Q. Did you hear him?

A. Yes.

Q. Will you tell us what Mr. Ekers said at that meeting, please.

A. Well, he told us the meeting—or gathering—was to talk over about the Union; that he didn't wish to see the Union come into the plant, and that he had called us together to ask our opinions.

Q. Did he say anything else that you can recall?

A. There was a lot said, I don't remember all of it.

Q. Do you now recall anything else as having been said?

A. Talked about wages and hours.

Q. What did Mr. Ekers say about wages?

A. He said we would be cut down to forty hours—whatever the Union contract called for pay rates that he would pay; there would be no over-time; he would close on Sundays.

[fol. 256] Q. Can you now recall anything else that he said?

A. There was so much said that I just don't remember.

Q. How long did the meeting last?

A. I would say approximately—not having a watch—approximately an hour and a half.

* * * * * * *

Q. Mr. Rodocker, I show you Plaintiff's Exhibit 12, and I ask you to refer to the first column of signatures. Does your name appear there?

A. Yes, sir.

Q. Is it opposite the figure "9"? That is your signa-

[fol. 257] ture?

A. Yes.

Q. Did you sign that?

A. Yes.

Q. On or about the date it bears, February 5th, 1954?

A. Yes, sir.

Q. Will you relate the circumstances under which you signed Plaintiff's Exhibit 12?

A. All of them?

Q. I don't understand your question. Let me put it to you again? I asked you would you relate to the Court the circumstances under which you signed this document, Plaintiff's Exhibit 12?

A. Yes, sir. I think prior to this here paper came around there was made a statement to me: "anybody having any——"

Mr. Denlinger: Just a moment. Who made it?

The Witness: Sure. Edward Gerry. That they knew who had anything to do with the Union, and when this was settled there would be new faces. Mr. Thursby brought

this paper around shortly afterwards and said: "You may read it and sign it if you want." And in order to protect my job—being afraid of it as I was—why, I signed it.

. . . . . .

[fol. 258] Cross-examination.

By Mr. Denlinger:

. . . . . .

Q. How many hours did you work in 1953?

A. I would have to figure that one up.

. . . . . .

Q. Well, figure these hours out first.

A. It is going to be inaccurate but I have the proof in my pocket.—Approximately 3315 hours.

Q. 3315 hours?

A. Yes, sir.

Q. How much did you draw—how much were your wages in 1953?

. . . . . .

[fol. 259] A. Somewhere in the neighborhood of $6,000.00—$5,500.00 or $6,000.00.

Q. As a matter of fact, you took in $6,315.00, didn't you?

. . . . . .

[fol. 260] Q. Where did you work before you came to Mr. Ekers?

A. Kroger & Company.

. . . . . .

Q. How much did you earn at Krogers the previous year?

A. I don't recall that.

. . . . . .

[fol. 261] Q. How much an hour were you working for at Krogers in 1952?

. . . . . .

A. I don't remember.

. . . . . .

[fol. 262] A. I would say somewhere in the neighborhood of $1.65 and $1.75 an hour down in 1952.

. . . . . .

Q. So your wages did go from $1.75 to $2.00 an hour in November of 1953, didn't they?

A. Yes, sir.

. . . . . .

[fol. 263] Q. How much paid vacation did you get?

A. I drew $100.00.

. . . . . .

Q. And you had only been employed at the company a year at that time, is that right?

A. Yes, sir, one year.

Q. So an employee with one year's service at this company drew $100.00 vacation pay at the end of the first year, is that right?

. . . . . .

A. Yes, sir.

. . . . . .

[fol. 264] Q. Did you talk to him at the time of the strike—that you went on strike—about anything?

A. I don't believe so—not about any grievance.

Q. So from the time of August, 1953, up to the time you went on strike on the 19th of February—20th of February, rather, you never talked to Mr. Ekers about any grievance?

A. I don't think so, no, sir.

Q. Now, you attended this meeting on February 1st, didn't you?

A. Yes, sir.

Q. What did you say at that meeting?

A. I agreed with the rest of them.

Q. What did you say, is my question.

A. I told Mr. Ekers that I would go along with him, that I didn't want the Union in the shop also.

Q. You said that in front of all the other employees, didn't you?

A. I had no choice, yes, sir.

Q. • • • What else did you say at this meeting on February 1st?

A. I said a number of things.

Q. What did you say?

• • • • • • •

Q. Was this out in the open, you said it to everybody, not particularly to Mr. Ekers?

A. There was about ten or twelve there, yes.

• • • • • • •

A. I told Mr. Ekers that I didn't want the Union in the shop, but whatever he did I would go along with him.

• • • • • • •

[fol. 265] Q. That is your signature?

A. It is.

• • • • • • •

Q. You weren't under the influence of any threats of anybody, were you?

A. Yes, sir.

Q. What threats?

A. Like I told you. The man faced me and told me he knew everybody that had any dealings with the Union and when this was settled there would be new faces. It was a threat against my job.

[fol. 266] Q. Who told you that?

A. Mr. Edward Gerry.

Q. He wasn't any one that could hire or fire?

A. That don't make any difference.

Q. Did Mr. Thursby present this to you?

A. He did.

Q. What did Mr. Thursby say when he presented this to you?

A. He said, "Read it and sign it if you want to."

Q. He didn't tell you that you had to sign it, did he?

A. I don't believe Mr. Thursby told me, no, sir.

Q. All Mr. Thursby said: "Read it and sign it if you want to."

A. I believe those are his words, might have been a little different.

Q. That is all he said to you?

A. Yes.

Q. And after that you signed it?

A. Yes.

Q. And after that you continued to work?

A. Yes.

. . . . . .

[fol. 267] HELEN MAYO, called by the defendants, being first duly sworn, testified as follows:

Direct examination.

By Mr. Riemer:

. . . . . .

[fol. 268] Q. Are you an employee of the plaintiff-corporation?

A. Yes, I am.

Q. When were you hired?

A. Around the latter part of October.

Q. What year?

A. Of 1953.

Q. And where were you hired?

A. At the Tallmadge store.

Q. You worked at Tallmadge?

A. Yes, I did.

Q. What was your job?

A. Cashier.

Q. Did you join the Union?

A. Yes, I did.

Q. Do you know the approximate date?

A. Around the 26th of February, 1954.

Q. Are you on strike now?

A. Yes, I am.
Q. When did you go out?
A. On the 8th of March.

* * * * * * *

Q. I show you Plaintiff's Exhibit 12, would you look towards the bottom of the first column, please. Do you see your name there?
A. Yes.
Q. Opposite the figure 16, is that your signature?
A. Yes.
Q. Did you sign it?
A. Yes.
Q. Will you relate the circumstances under which you signed this Plaintiff's Exhibit 12? It bears date of February 12th.
A. Mr. Thursby handed this to me and said: "Sign this." I said: "Do I have to?" He stuttered and says, "Well, if you want to."
Q. Did you sign it?
[fol. 269] A. I signed it. I felt I had to.

Mr. Denlinger: I object and ask that the last part be stricken.
The Court: Strike the last part: "I felt I had to."

* * * * * * *

[fol. 270] David Seidman, called by the defendants, being first duly sworn, testified as follows:

Mr. Riemer: Your Honor, this witness is called for the purpose of introducing testimony concerning interstate commerce.
The Court: All right. And I am accepting this with the same reservation. You take a general objection to this line of testimony.

Direct examination.

By Mr. Riemer:

* * * * * * *

Q. By whom are you employed?
A. Peerless Packing Company.

Q. And in what capacity?

A. Office manager.

Q. In the job of office manager will you relate very briefly what that entails. What do you do?

A. In charge of all the records, the office personnel and accounting.

Q. Do you, as office manager, have the custody of the books and records of the company?

A. Yes, I do.

Q. Do those books and records reflect the purchases by Peerless?

A. Right.

Q. And some books reflect the sales by Peerless to various customers?

A. Right.

Q. Do you number as one of your customers Fairlawn Meats, Inc., of Akron?

A. Right.

[fol. 271] Q. Mr. Seidman, did you at my request prepare, or cause to be prepared as office manager, in March of 1954, before the Federal Court proceeding, certain data with respect to the purchase of Peerless Packing and sales to Fairlawn Meats?

A. Right. For 1953.

Q. You did that for the year 1953?

A. Right.

Q. And you are here today under subpoena, are you now?

A. Right.

* * * * * * *

[fol. 272] T. W. O'Dell, called by the defendants, being first duly sworn, testified as follows:

Direct examination.

By Mr. Riemer:

* * * * * * *

[fol. 273] Q. * * * Are you employed by Fairlawn Meats?

A. Yes, sir.

Q. Where? That is, what branch.

A. Tallmadge.

. . . . . .

Q. You weren't invited? You did sign the petition on February 10th—Plaintiff's Exhibit 12—did you not?

A. That's right.

Q. And can you find your name on this? Is this it opposite the numeral 15?

A. Yes.

Q. Tell us the circumstances under which you signed that.

A. They brought the petition around, and every one was standing around, and they told me if I wanted to sign it, it was all right, and if I didn't it was all right. So I signed it the same as every one else.

. . . . . .

[fol. 274] Q. Mr. O'Dell, before February 4th, 1954, will you tell us what your hourly rate of pay was?

A. Started at $1.25.

Q. Don't tell us what it started out to be; what was your hourly rate before February 4th, 1954?

A. $1.50 an hour.

Q. After February 4th, 1954, did you get an increase?

A. Only on Sunday work.

Q. You got an increase for work on Sunday?

A. Twenty-five cents an hour.

Q. So that when you worked on Sunday you received $1.75, is that correct?

A. That's right.

. . . . . .

Cross-examination.

By Mr. Denlinger:

. . . . . .

[fol. 275] Q. Mr. O'Dell, as part of your duties there you weren't required to work on Sunday, were you, if you didn't want to work on Sunday extra time?

A. I didn't have to work on Sunday, no.

. . . . . .

THOMAS TANDARICH, called by the defendants, having been heretofore duly sworn, testified as follows:

Direct examination.

By Mr. Riemer:

. . . . . .

[fol. 276] Q. Now, Tom, you have identified your signature on this Plaintiff's Exhibit 5. Will you tell the Court the circumstances under which you signed this? Do you want to hold it? Will that help you?

A. I guess March 6th. Is that Saturday?

Q. Yes, sir, it was.

A. I just came back from deliveries that day and I went to check in my bills, and on the way out Mr. Thursby approached me and he asked me for my resignation, which I didn't have to sign if I didn't want to.

Q. You mean that paper you have in front of you?

A. Yes, this here. And after I signed my resignation I asked Mr. Thursby if I could have my position if I quit the *the* Union or got a withdrawal card, and he said I could.

Q. Thursby said you could have your job back if you quit the Union?

A. Yes, if I quit the Union.

Q. You haven't quit the Union yet, have you?

A. No.

Q. Have you asked for your job back since?

A. No.

Q. I show you Plaintiff's Exhibit 12, and in this first column, opposite the numeral 6, appears your name. Is that correct?

A. Yes.

Q. Can you tell us the circumstances under which you signed this Plaintiff's Exhibit 12?

A. I think when it was passed to me I just came back from delivery in the morning, and I think Audrey Kitchen asked me if I would sign that there, which I did.

Q. Audrey Kitchen is another employee?

A. Yes.

[fol. 277] Q. And you did sign it?

A. Yes.

Q. Subsequent to the date you signed this you did join the Union?

A. Afterwards, yes.

* * * * * * *

Cross-examination.

By Mr. Denlinger:

* * * * * * *

[fol. 278] Q. You joined the Union March the 2nd. Right?

A. Yes.

Q. You signed this paper on March the 6th?

A. Yes.

Q. You signed this paper after you joined the Union?

A. Uh huh.

Q. Did you tell Mr. Thursby you had joined the Union?

A. Yes; he found out from Eddy Gerry.

Q. You told Eddy Garrity, did you?

A. I didn't tell him; he found out some way.

Q. You mean Eddie Gerry, not Garrity?

A. You said Garrity; I didn't.

Q. Why did you sign this paper?

A. Oh, I don't know.

Q. Plaintiff's Exhibit 5. Tell the Court why you signed it.

A. I resigned my job.

Q. Nobody threatened you, did they?

A. No, they never.

* * * * * * *

[fol. 279] Q. Did you ever ask Mr. Thursby or Mr. Ekers for a raise?

A. Well, let's see—I started in at $1.00; after I started driving truck he give me a raise; and later on I think I [fol. 280] got another raise.

Q. You got two raises since you have been there, is that right?

A. Yes, I think so.

* * * * * * *

Q. You had just gotten out of school, is that right?
A. Yes, sir.

• • • • • • •

Q. So you were a High School student when you got this job at $1.00 an hour?
A. Yes, sir.
[fol. 281] Q. And in six months you received two raises, is that right?
A. Yes, I think so.
Q. And what was your final pay when you left?
A. $1.30 or $1.35; I'm not sure.
Q. Driving a truck?
A. Uh huh.

• • • • • • •

Recross examination.

By Mr. Denlinger:

Q. Have you worked any place else but Ekers?
A. Yes, sir.
Q. Where?
A. Saalfield Publishing Company.
Q. How much did you make there?
A. Eighty-five cents an hour.

• • • • • • •

[fol. 282] David Seidman, recalled by the defendants for further examination, testified as follows:

Direct examination.

By Mr. Riemer:

Q. Mr. Seidman, did you in this brief recess, while you were off the stand, complete the tabulation of those figures?
A. I did.
Q. Can you now tell us, based upon those records which you brought with you, the gross amount of sales by Peerless Packing Company to Fairlawn Meats, Inc., for the year, 1953?
A. It is $221,526.20.

Q. Will you repeat that figure?

A. $221,526.20.

Q. That is the dollar volume of purchases by the plaintiff from Peerless Packing?

A. Right.

Q. As revealed by your records. Now also, Mr. Seidman, did I not ask you to prepare the figures showing the source of dressed cattle sold by Peerless to Fairlawn for the year 1953?

A. Right.

Q. And did you do so?

A. I did one month, I did December, 1953.

Q. Now, can you tell us the system or method that Peerless used so that the source of the cattle can be identified?

A. We used lot number. When the livestock is purchased we assign a certain lot number to a group of cattle, and identify each carcass by a continuous sub-number in that lot.

Q. So that it is possible then for you to tell under that lot system or lot number system the source of your cattle? [fol. 283] A. That's right.

Q. Incidentally, those cattle are all received live by Peerless, are they not?

A. That's right.

Q. And slaughtered by Peerless?

A. That's right.

Q. And dressed for the consumer?

A. For the retail store.

Q. Based upon your records you say you prepared a sample?

A. For December, 1953.

Q. For the one month only?

A. Right.

Q. What does that sample reveal as to the source of cattle sold to the plaintiff?

A. You asked me to separate the livestock bought in Ohio and that bought outside of Ohio. 56.78 from out of the state, 42.22 per cent from Ohio.

Q. Was the first figure per cent?

A. 56.78 outside.

The Court: And the next was what?

The Witness: 42.22 purchased in Ohio.

Q. That is by Fairlawn?

Mr. Denlinger: No, that is by Peerless, isn't it?

Mr. Riemer: Let me ask him, Mr. Denlinger. I want to clarify that statement.

Q. Does that sample figure—is that a sample figure for Fairlawn's purchases——

A. Fairlawn's purchases from Peerless.

Q. In other words, is it correct for me to state that 56 per cent of the plaintiff's purchases in the month of December, 1953, were cattle originating outside of the State of Ohio?

A. That's right.

Q. Do you keep account or track of your lot numbers [fol. 284] on your beef, Mr. Seidman?

A. Yes, we do.

Q. By you I mean Peerless Packing Company.

A. Peerless Packing Company, yes.

Q. So that you know to whom those lot numbers are sold?

A. That's right, it appears on the sales invoice, the same lot number.

Q. Mr. Seidman, would you now put onto Defendants' Exhibit 26 the figure taken from this tape, showing the gross sales which you previously testified to?

(Witness does as requested.)

* * * * * * *

Cross examination.

By Mr. Denlinger:

Q. Do you have a Union in your plant?

A. We do.

Q. Do you know Mr. Pollock?

A. Yes, I have seen him before.

Q. Have you talked with him?

A. Sure did.

Q. Talk to him about this case?

A. Well, in general.

* * * * * * *

I saw him together with Mr. Riemer.

• • • • • • •

[fol. 285] Q. Did you ever prepare information like this in any other case?

A. Never before.

• • • • • • •

[fol. 286] Q. Mr. Ekers isn't buying of you any more, is he?

A. That's right.

• • • • • • •

Q. Will you answer it, please?

A. Well, I understand from what the boys tell that the Union asked the Company not to sell because there was labor trouble.

• • • • • • •

[fol. 287] OFFERS IN EVIDENCE

Mr. Riemer: The defendants now offer all exhibits which they have had marked, they being Defendants' Exhibits 6-A to -L.

Mr. Denlinger: What is Exhibit 6?

Mr. Riemer: They are documents prepared by Mr. Moyer based upon the company records.

Mr. Denlinger: We have no objection.

The Court: They may be admitted.

Mr. Riemer: Defendants' Exhibit 7-A and -B, record prepared by Mr. Moyer of plaintiff's interstate purchases.

Mr. Denlinger: No objection.

The Court: They may be admitted.

Mr. Denlinger: With the reservation that we claim that interstate——

[fol. 288] The Court: Yes, I understand.

Mr. Riemer: Defendants' Exhibit 8-A and -B, record of purchases intra-state for the month of January, 1954.

Mr. Denlinger: No objection.

The Court: They may be admitted with that same reservation.

Mr. Denlinger: Yes, your Honor.

Mr. Riemer: Defendants' Exhibit 9, Mr. Moyer's preparation of gross purchases interstate for the month of January.

The Court: It may be admitted with the same reservation.

Mr. Riemer: Defendants' Exhibit 15 is statement prepared by Accountant Cook.

The Court: You claim it was not competent and is not material?

Mr. Denlinger: That's right.

The Court: Your are not objecting to the form of manner of preparation?

Mr. Denlinger: No.

The Court: The Court will allow its introduction with the same reservation, that if I find it does not apply, I will disregard it.

* * * * * * *

Mr. Riemer: Defendants' Exhibits 19 to 24, inclusive, [fol. 289] your Honor, are pictures taken by the witness Pollock.

Mr. Denlinger: No objections.

The Court: They may be admitted.

Mr. Riemer: Defendants' Exhibit 25 is this document prepared by the witness Pollock.

The Court: Any Objection?

Mr. Denlinger: If that is admitted we would then ask that Exhibits 12 and 13 set forth the same information.

The Court: That is on the same basis, I sustained that.

Mr. Denlinger: I have no objection to that going in if these go in. These have been examined on further and the signatures identified by their witnesses. The Court isn't going to be prejudiced one way or the other.

The Court: I am going to reverse my ruling on those two exhibits 12 and 13 and allow them to be introduced as well as your exhibits.

Mr. Denlinger: And receive 25, is that it?

Mr. Riemer: Yes. And Defendants' Exhibit 26 is the last one, your Honor. That is this statement——

The Court: Did you check that with the tape and original entries? I see no objection to it. It goes to the ques-

tion of interstate commerce. It may be admitted with the same reservation.

Mr. Riemer: That completes it.

The Court: You have nothing in rebuttal and you are resting.

Mr. Riemer: Yes.

[fol. 290] RENEWAL OF MOTION TO DISMISS AND TO VACATE RESTRAINING ORDER AND DENIAL THEREOF

The Court: Now you will want to renew your motion for the record.

Mr. Riemer: Then having rested, your Honor, and the plaintiff having no rebuttal, I now renew the motion to dismiss on the grounds previously stated, and request, as well, that the temporary restraining order heretofore issued be vacated.

The Court: I will overrule that at this time.

* * * * * * *

Reporter's certificate to foregoing transcript omitted in printing.

[fol. 291] IN THE COURT OF COMMON PLEAS

No. 192338

FINDING—Emmons, J., September 2, 1954

In the first instance, it appearing to the court that there was a misnomer of the Union defendant wherein I was referred to as Local Union No. 427, Amalgamated Meat Cutters Union, Affiliated with the American Federation of Labor, and that the true style of the said Union is the Amalgamated Meat Cutters and Butcher Workmen of North America, Local No. 427, A. F. of L., the court is permitting the change of name to be made to conform to the proof by interlineation without reverification.

This cause came on to be heard upon the issues raised by the pleadings, and upon trial being duly had the court is of the opinion that there are but two questions involved:

First: Does the Common Pleas Court have jurisdiction in this case?

Second: Did the evidence prove a situation existing such as made picketing and other acts of the defendants [fol. 292] illegal to the extent that a permanent injunction should issue?

It goes without saying that if the first question is to be determined in the negative, then the second question need not be answered.

The defendants make much ado over the fact that the plaintiff company made purchases of meat, dressed and processed, which originally came into the state by interstate commerce, and since such was the fact then the National Labor Relations Board acquired exclusive jurisdiction in this case.

Albert Satin, Inc., v. Local 445 Electrical Workers, 22 L. W. 2606. In this case it was held that while it is apparent from a reading of the pertinent decisions and provisions of the Federal Act that Congress did give the Board exclusive jurisdiction over unfair labor practices affecting interstate commerce, it also gave the Board power to cede its jurisdiction to state courts.

Garner vs. Teamsters, 74 Sup. Ct. 161. Here the court determined that neither the NLRB nor the Labor Management Relations Act were involved except in cases in which the controversy "affects interstate commerce."

The cases following this particular line of reasoning continued to add to the phrase "affecting interstate commerce" and making it read: "substantially affecting and interfering with interstate commerce."

Later on the NLRB in the following cases expressed what was known as "the volume of business test." 91 [fol. 293] NLRB 638; 88 NLRB 226, 87 NLRB 248.

Finally the Board has set down greater measures and newer standards for "the volume of business test," which standards became effective July 15, 1954, and are set out in 14014 C. C. H.

"For retail stores:

1. A single independent retail store or chain of stores operating entirely within one state will not come

under the Board's jurisdiction unless the store involved in the case has:

(a) Purchases amounting to at least $1,000,000.00 a year coming to it directing from outside the state;

(b) Purchases of $2,000,000.00 a year coming to it indirectly from outside the state."

(The former standards for stores were $500,000.00 a year for direct purchases from outside the state and $1,000,000.00 a year from indirect purchases outside the state.)

Since less than 5 per cent of the plaintiff's business was wholesale, that business would well come within the definition of retail stores, and under either standard the business done by the plaintiff company was well under those measures of "volume of business."

Recently the NLRB in the case of Union vs. Arthur and Ted Shapiro, dba the Packard Company, dismissed that case in which the Packard Company was charged with unfair labor practices because it involved "small business" and did not come within the limits that the Board set for accepting jurisdiction, the purchases being well under the $1,000,000.00 class.

[fol. 294] It is therefore the court's finding that insofar as the first question is concerned that this court does have jurisdiction in this case, since the plaintiff company too is well within the limits set by the Board in their "volume of business test," and that if the Board originally had jurisdiction, it had ceded that to the state court.

Coming to the second question to be here determined, the court finds that a stipulation was signed by B. H. Ekers for the plaintiff, and Dan J. DeSantis, business representative, for the defendant Union, in which the employer (the plaintiff company) agreed that when a contract was concluded it should include a provision establishing a union shop security clause, and also further provided that either party might at their option cancel the stipulation.

Ekers, on behalf of the plaintiff company, would not sign a contract with the defendant Union, and even went so far as to bring this injunctive proceedings against them, so he thereby, constructively at least if not actually, exercised his option to cancel the aforesaid stipulation—so in-

sofar as this case is concerned, this stipulation is of no effect, except to express the intention of the defendants to cause the plaintiff company to establish a union shop.

The contract which the plaintiff company was asked to sign, and which the president refused to do, contained, among other terms, the following:

> [fol. 295]: "All employees covered by this agreement shall within thirty days after the execution of this agreement, or thirty days after their employment, whichever is later, during the term of this agreement, become members of the Union and remain members of the Union in good standing during the life of this agreement. The employer agrees to notify the Union of any new help."

Evidence was presented which proved the fact to be that no employees were exempted from the coverage and the terms of the contract, so that if and when the contract was signed it would be a compelling force for all the employees of the plaintiff to become members of the said Union, whether they wanted to or not or they could no longer be employed by the plaintiff company. And of the 50 employees of this company 41 of them on February 10th, 1954 signed the following statement:

> "We, the undersigned, employees of the Fairlawn Meats, Inc., hereby certify that there is no dispute or disagreement between us and our employer, the Fairlawn Meats, Inc., as to hours or work, rate of pay, or any conditions affecting our employment, and we are not on a strike against our employer, and we are not in favor of our employer signing any agreement that will force or compel us to join any union."

There have been numerous cases decided, locally and nationally, which heretofore gave the unions the right to peacefully picket and banner an employer under the constitutional right of freedom of speech, even though there was no labor dispute. Some of these cases are as follows: A. F. of L. vs. Swing, 312 U. S. 321; Milk Wagon Drivers etc., v. Meadowmoor Dairies, Inc., 312 U. S. 287; Iacomini's [fol. 296] Restaurant, Inc., vs. Hotel Employees and Bar

Tenders Local 118 et al., 63 Ohio Law Abstract 258. However there has been a recent definite trend that shows a change of thought, as pointed out in W. E. Anderson Sons Company vs. Local Union 311, 156 O. S. 541

> "Suddenly the view of the Supreme Court seemed to change to a recognition of rights in certain instances which warranted an injunction against picketing or bannering notwithstanding the constitutional protection of free speech."

After making the above statement Justice Hart, speaking for the Supreme Court of Ohio, then cited three cases decided by the Supreme Court of the United States: Building Service Employees International Union Local 262 vs. Gazzam, 339 U. S. 532; Hughes vs. Superior Court, 339 U. S. 460; International Brotherhood of Teamsters Union Local 309 vs. Hanke, 339 U. S. 470.

Quoting syllabus 4 in the Anderson case, supra, 156 O. S. 543:

> Picketing or bannering as a means of exercising free speech will be afforded constitutional protection as long as it is lawfully conducted, but the right of free speech is predicated on the lawful use of that right, and if through conspiracy or unlawful conduct the result of its exercise by such means unlawfully injures another in his property rights, the guarantee ceases and the exercise of the claimed right by such means may be enjoined or prohibited."

It was stated by Justice Minton In Union vs. Gazzam, 339 U. S. 533, cited supra:

> "If respondent had complied with petitioner's demands and had signed one of the tendered contracts [fol. 297] and lived up to its terms, he would have thereby coerced his employees. The employees would have had no free choice as to whether they wished to organize or what union would be their representative."

108 O. S. page 95, in The LaFrance Electrical Construction and Supply Company vs. the International Brother-

hood of Electrical Workers Local 8, et al., Justice Florence Allen said:

> "Equality of justice demands that in any controversy the rights of all parties are scrupulously maintained. The right of the workmen to be employed, irrespective of union membership, must be maintained; the right of the employer to conduct his business without illegal interference must be upheld and legal means employed by strikers must not be curtailed."

Crosby vs. Rath, 136 O. S. 352:

> "The right to contract, the right to do business and the right to labor freely and without restraint are all constitutional rights, equally sacred, and the privilege of free speech cannot be used to the exclusion of other constitutional rights, nor as an excuse for unlawful activities in interference with another's business."

Coming now to a decision rendered by our own Ninth District Court of Appeals in 94 Ohio Appeals 361, Bean vs. Local Union 698 et al., we find the syllabus in this case as follows:

> "In the absence of a dispute between employer and employees, or between the union and the employer or employees, a labor union may not engage in organizational picketing, even though peaceful, for the purpose of bringing pressure to bear upon the employer to re- [fol. 298] quire his employees to join the union."

In his opinion in the Bean case Judge Stevens stated:

> "The sole question for determination here is this: May a union, in the absence of a dispute between employer and employees, or between the union and the employer or employees, engage in peaceful picketing for the purpose of bringing pressure to bear upon the employer to require his employees to join the union? In other words, may peaceful picketing for organizational purposes of the union be lawfully conducted? We think the question stated has been completely an-

swered in the negative by the decision in Crosby vs. Rath."

Was there a labor dispute in the instant case? Miller vs. District 76, 23 Labor Cases 67487:

"Picketing for the purpose of coercing an employer to sign a collective bargaining agreement and compelling his employees to rejoin the union does not present the existence of a labor dispute and will be enjoined."

Wichusen vs. Griffin, 23 Labor Cases, Section 23683:

"Not every matter which directly or indirectly affects labor is a labor dispute. There is no labor dispute involved where a union pickets for the unlawful purpose of forcing an employer to sign a contract recognizing the union as exclusive bargaining representative of his employees, without their consent."

Hotel Restaurant vs. Union, 23 Labor Cases Section 67485:

[fol. 299] "Picketing for the purpose of forcing an employer to recognize as his employees' bargaining representative a union which does not represent a majority of his employees is the use of economic pressure for an illegal purpose and not in support of a bona fide labor dispute."

227 Ohio Jurisprudence page 45:

"Picketing is not beyond the control of the state if the manner in which picketing is conducted, or the purpose which it seeks to effectuate, gives grounds for its disallowance."

I am governed in this case by the previous holdings made by courts superior to this one, and I am duty bound to apply the evidence as I find it to—the law in this case, as interpreted by those courts.

Therefore, from all the evidence presented the court is of the definite conclusion that the defendants, Pollock and

Dougherty, acting for the defendant Union, attempted to get Ekers, President of Fairlawn Meats, Inc., to sign a contract compelling union membership in the defendant Union within 30 days or be discharged from the employment of the plaintiff company, which fact would have denied the employees their freedom of choice; that there was no labor dispute existing; that the banners, which recited: "On strike", did not state the truth, and that while picketing and bannering were peaceful yet since no labor dispute was involved the picketing and bannering became unlawful and caused a diminution of the plaintiff's business to some 30 per cent.

[fol. 300] I believe that it now has been established clearly by the decisions of the courts and the NLRB that injunctions will lie when the picketing and bannering is peaceful but unlawful, as well as where it is not peaceful.

A conspiracy is a combination of two or more persons to accomplish by concert of action some unlawful purpose, so that even though the pickets and defendants believed they were acting lawfully in peaceful picketing and bannering the plaintiff company, yet if it develops that their actions are unlawful then, having acted in concert, they become members of a conspiracy. Since the court is of the opinion that there is no labor dispute existing, then peaceful picketing and bannering done by the members of the defendant Union under the guidance and direction of the defendants was a conspiracy to do an unlawful act.

In this instance the court wishes to state that insofar as picketing and bannering were concerned it was evident that the members of the defendant Union acted as ladies and gentlemen in all respects. However, even though the court finds no fault in the manner of picketing, yet the purpose for which it was done makes it unlawful so as to entitle the plaintiff to injunctive relief.

Was there a secondary boycott?

A secondary boycott is a combination not merely to refrain from dealing with a person, or to advise or by peace-
[fol. 301] ful means persuade his customers from dealing with him, but to exercise coercive persuasion upon those parties from whom the person buys and to whom he sells which causes the buyers and the sellers to withdraw from

business with that person through fear of loss and damage to themselves.

There was evidence of probative value to sustain a charge of secondary boycott, and while those acts were not of such great prominence, yet they successfully lent themselves to proving the charges in the petition.

The court concludes that the allegations of the petition have been proved with sufficient weight as causes this court to find that the prayer of the petition should be sustained ordering a permanent injunction as asked for therein.

Journal entry to be prepared to conform to the court's finding, saving exceptions to these defendants.

[File endorsement omitted].

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* * * * * * *

[fol. 302] IN THE COURT OF COMMON PLEAS

Case No. 192338

JOURNAL ENTRY CONTAINING DECREE—October 18, 1954

1. This cause came on to be heard upon the pleadings, the evidence and the arguments and briefs of counsel for the parties, and the issues having been duly tried, and the Court, after due deliberation, having made a finding herein and filed the same in which a decision in favor of the plaintiff and against the defendants is duly made, the Court finds on the issues joined in favor of the plaintiff and against the defendants and that the prayer of plaintiff's petition should be granted.

2. It is, therefore, Ordered and Decreed that the defendants and each of them and the officers and members of the defendant union and all persons acting with the defendants or in concert with the defendants be and they hereby are enjoined and restrained from:

(1) Picketing the stores and places of business of the plaintiff and from congregating, standing or having individuals congregate and stand on the premises where plaintiff's stores are located and from coercing,

threatening, intimidating or turning aside against their will those who would go to the plaintiff's stores to sell, purchase or deliver goods, or any of the em-
[fol. 303] ployees of plaintiff.

(2) Trespassing upon plaintiff's property.

(3) Compelling or inducing, or attempting to compel or induce by threats, intimidation, persuasion, force or violence any of plaintiff's suppliers of merchandise to refuse or fail to sell and deliver merchandise to the plaintiff.

(4) Warning plaintiff's employees, agents or officers, or persons about to become such, that they will suffer or be likely to suffer any of the wrongs or injuries enjoined in this order, if they enter plaintiff's employment or continue therein.

(5) Aiding or advising any person to commit any of said wrongs or injuries.

The defendants shall pay the costs herein, for which sum judgment is awarded to plaintiff. Exceptions to the defendants to the finding and order are granted. Bond for appeal One Hundred Dollars ($100.00).

(S) Emmons, Judge.

Approved by Counsel.

[File endorsement omitted]

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[fol. 304] IN THE COURT OF COMMON PLEAS

No. 192338

NOTICE OF APPEAL—Filed October 27, 1954

The defendants hereby give Notice of Appeal to the Court of Appeals from a final order permanently enjoining and restraining the defendants and a judgment rendered by the Court of Common Pleas in the above entitled cause on the 13th day of October, 1954. Said appeal is on questions of law and fact.

(S) Smoot and Riemer, Attorneys for Defendants-Appellants, 514 Bulkley Building, Cleveland 15, Ohio, SUperior 1-1930.

[File endorsement omitted]

[fol. 305] IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT.

OPINION—May 18, 1955

Appeal on Questions of Law and Fact

Stanley Denlinger, Ray J. McGowan, and Robert Sheck, For Appellee.

Smoot & Riemer, For Appellants.

HUNSICKER, J.

This is an appeal on question of law and fact.

In this opinion, the appellee (plaintiff below) shall be designated as Fairlawn Meats, and the appellants (defendants below) shall be designated as the Union. The cause in this court, by agreement of the parties, was heard on the transcript of testimony taken in the trial court, together with the exhibits there introduced.

Fairlawn Meats operates three stores for the sale of meats and related products, to both wholesale and retail

customer. Approximately 50 persons are employed, a minority of whom were members of the Union at the time of or during the occurrences which led to the controversy [fol. 306] herein.

The Union, through its responsible officers in this area, sought to organize the employees of Fairlawn Meats, but were unable to secure more than 18 members, although, at the time of the strike herein, there were less than 10 who actively interested themselves in the conduct of the strike.

After efforts to organize the employees failed, the management was approached with a request that it recognize the Union as sole bargaining agent of the employees, that they sign a contract that would require that all of their employees join the Union within 30 days, or, if they refused to do so, they would be discharged. Other provisions of the standard contract were proposed to the management, which, after many discussions, refused to enter into a contract with the Union. The evidence discloses that there was no discrimination in the employment or discharge of members of the Union, and that they could join or not join, so far as management was concerned.

The Union, when Fairlawn Meats refused to sign the contract, then bannered each place of business. Most of the employees who were members of the Union remained away from their jobs, although a few who first left their employment returned to work, and a few signed a statement of resignation from Fairlawn Meats.

[fol. 307] At two of the stores, picketing was done by using land owned by, or under lease to, Fairlawn Meats; and, although the Union officials were notified of this fact, picketing continued over such lands.

The evidence also showed that Mr. Ekers, the manager and principal owner of Fairlawn Meats, was followed by Union officials when he went to some of the places where he purchases meat, and that, on one such instance, while at the place where he bought meat for resale, the air was let out of the tires of his automobile.

There is competent, credible evidence to show that, in order to enforce the demands of the union that Fairlawn Meats sign the standard contract requiring Fairlawn Meats to force the employees to join the Union, or be discharged,

at least two of the companies from whom meats were purchased for resale were threatened with imminent labor difficulties within their plants. As a result of these threats, such companies refused to sell any meat products to Fairlawn Meats.

Fairlawn Meats filed an action in the Court of Common Pleas, asking for both a temporary and a permanent injunction. The Union denied that the state trial court had jurisdiction to entertain the action, and, without waiving its objection to jurisdiction, said that it was engaged in a bona fide labor dispute, denied that it engaged in any unfair labor practice, and asserted its right to picket the places of business of Fairlawn Meats. The case is heard in this court de novo on the same pleadings filed in the trial court.

[fol. 308] The first question that confronts this court is that concerning the jurisdiction of the state court to proceed in a determination of the issues herein.

The Congress of the United States, by the enactment of the National Labor Relations Act, intended to exercise the full scope of its authority to regulate unfair labor practices affecting interstate commerce. Universal Car & Service Co. of Grand Rapids v. I. A. M., Lodge 1573, 27 Labor Cases, C. C. H. par. 68,825.

"Affecting commerce" is defined in the Labor Management Relations Act. See Title 29, U. S. C. A., Sec. 152 (7).

It is not necessary to discuss "jurisdictional yardsticks," as found in the regulations of the National Labor Relations Board (1 Labor Law Reporter, C. C. H., par 1610, p. 1614), to determine whether the National Labor Relations Board will assume jurisdiction. It is not necessary to explore what areas in labor controversies are left open to the jurisdiction of the state courts. It is apparent that we have before us in the instant case a question of fact which may be stated as follows: Does the business of Fairlawn Meats, Inc., affect interstate commerce within the terms of the National Labor Managements Act? Or, it may be stated: Do the facts herein show that Fairlawn Meats, Inc., is an "industry affecting commerce" within the terms of the National Labor Managements Act?

Although it is true that the "jurisdictional yardstick" established by the regulations of the National Labor Re-

[fol. 309] lations Board may be helpful as evidence to determine the fact, it is not, in the case before us, the controlling feature.

The evidence herein clearly shows that the business of the plaintiff is purely of a local character. It is limited in the main to Akron and the surrounding area. The volume of business is not large for a city and county as populous as Akron and Summit County; it does not sell any of its products outside of the state of Ohio. Its purchases from out of this state, both direct and indirect, do not constitute a large portion of the products its offers for sale to the meat-consuming public in Akron and Summit County.

We find, therefore, that there is no burden placed upon, or obstruction of, interstate commerce by any action taken by the parties to this case.

We determine, therefore, that the state courts have jurisdiction to hear the case.

We come now to the second question presented by the facts as shows by the transcript of testimony and the exhibits before us. Should the injunction be granted?

The case which pronounces the policy of the state of Ohio, with respect to organizational picketing, is Crosby v. Rath, 136 Ohio State, 352; and, while it was true that, in that case, there was much evidence of violence which accompanied the picketing, yet the court said, at page 355:

> [fol. 310] "* * * The thing upon which the defendants are insisting is that the plaintiff discharge her employees unless they become members of one of the defendant unions. There is no reason or convincing authority sustaining the contention of the defendants that they have the right to engage in picketing or boycotting under such circumstances. That this must be the law is clearly indicated by the intolerable and unexplainable predicament in which an employer might well find himself if picketed by two or more hostile unions with each one insisting that the employer discharge his employees unless they become members of that particular union alone."

The latest pronouncement by the Supreme Court of Ohio on the subject of the right to picket for organiza-

tional purposes is found in the case of W. E. Anderson Sons Co., v. Local Union #311, etc., et al., 156 O. S. 541. The syllibi in that case, which establishes the law, says:

"1. Where no unlawful purpose or object is involved, workers may by means of picketing or bannering announce their grievances to the public and thus persuade or seek to persuade prospective employees as well as prospective customers of the person against whom the picketing or bannering is directed from dealing with such person.

"2. A boycott may be defined in general terms as a concerted refrainment from business relations with another, or a concerted persuasion of third persons outside the combination to so refrain. It may be primary where there is a concerted refrainment from business relations with another, or by peaceful means a concerted inducement of others outside the combination to so refrain; or it may be secondary where there is not merely a concerted refrainment from business relations with the person against whom the boycott is directed or by peaceful means a concerted inducement of others outside the combination to so refrain, but an exercise of economic pressure upon such others to cause them to refrain from business relations with the person against whom the boycott is directed, through fear of loss or damage to themselves if they refuse to do so.

"3. Where a building trades union which has a labor dispute with one of several subcontractors on a con- [fol. 311] struction job pickets and banners the construction site for the purpose of inducing the craft employees of the general contractor to quit their employment in concert and thereby bring about a work stoppage on the entire construction job, all for the further purpose of influencing such general contractor to cause the discharge of the subcontractor with whom the union has the labor dispute such picketing and bannering constitute a secondard boycott.

"4. Picketing or bannering as a means of exercising the right of free speech will be afforded constitutional protection so long as it is lawfully conducted,

but the right of free speech is predicated on the lawful exercise of such right, and if, through conspiracy or unlawful conduct, the result of its exercise by such means unlawfully injures another in his property rights, the guaranty ceases and the exercise of the claimed right by such means may be enjoined or prohibited.

"5. Picketing or bannering for the purpose of aiding or bringing about a secondary boycott may be enjoined."

This Court of Appeals has had occasion to pass on the right to picket for organizational purposes in the case of Bean v. Local Union No. 698, et al., 94 O. App. 361, wherein we said:

"In the absence of a dispute between employer and employees, or between the union and the employer or employees, a labor union may not engage in organizational picketing, even though peaceful, for the purpose of bringing pressure to bear upon the employer to require his employees to join the union."

In the instant case, the principal object and purpose of bannering the places of business of Fairlawn Meats, Inc., was for the purpose of forcing the great majority of employees to join the Union. The resultant acts of the Union to secure their object, such as coercion of the suppliers of meats, and picketing on property under control [fol. 312] of Fairlawn Meats, was the result of the failure of the Union to secure the organization of the majority of the employees by peaceful means. This failure to convince the employees and the management was then followed by the picketing lines being establishd.

When we examine the acts of Congress, with respect to national labor relations (U. S. C. A., Title 29, Chapter 7, Section 151, et seq.), we find that Sec. 157 of the above act says:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted ac-

tivities, for the purpose of collective bargaining or other mutual aid or protection * * *."

And Section 159 says, in part:

"(a) Representatives designated or selected for the purposes of collective bargaining by the *majority* of the employees * * * shall be the exclusive representatives of all the employees in such unit * * *." (Italics ours.)

It is thus apparent that, even where jurisdiction does lodge in the National Labor Relations Board, there is an opportunity for the Union to appeal to that board, but, in the instant case, without a majority of the employees of Fairlawn Meats, it would be a futile act, and the Union would lose all right to proceed in the manner it did in this case.

Although counsel for the Union insist that the National Labor Relations Board does have jurisdiction, it seems to us that the picketing engaged in herein was part of a [fol. 313] plan to avoid an election by such board, and thus deprive the employees by majority vote to select or not to select bargaining representatives.

The declared policy of the United States, through the Labor Management Relations Act, supra, is to encourage the practice and procedure of collective bargaining, and to protect the exercise by employees of full freedom of organization and selection of representatives of their own choosing.

It is the public policy of the State of Ohio, as declared in the cases cited, supra, that employers may not be picketed for the purpose of coercing their employees to join a union. The Supreme Court of the United States has indicated its approval of such a state policy as adopted by the legislature of the state of Washington, when it said, in Building Service Employees International Union, etc., vs. Gazzam, 339 U. S. 532, 70 S. Ct. 784, 94 L. Ed. 1045, as follows:

"In a state whose public policy is that employers shall not coerce their employees' choice of a bargaining representative, a state court injunction against peaceful picketing by a labor union for the particular

purpose of compelling an employer to sign a contract which would coerce his employees' choice of a bargaining representative does not violate the right of free speech guaranteed by the First and Fourteenth Amendments of the Federal Constitution.

"(a) Since picketing is more than speech and establishes a *locus in quo* that has far more potential for inducing action than the message the pickets convey, this Court upholds a state's restraint of acts and conduct which are an abuse of the right to picket rather than a means of peaceful and truthful publicity.

[fol. 314] "(b) The picketing of the employer to compel him to coerce his employees' choice of a bargaining representative was unlawful because it was an attempt to induce a transgression of the State's policy against such coercion of employees."

We do not believe that there is a difference in the effectiveness of the policies so adopted, whether by legislative act or by declaration of the highest judicial authority in the state.

It is declared by Section 158 of the National Labor Managements Act to be an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" to employees by Section 157 of the Act (right of employees to organize or refrain from such activity). Where, then, as in this case, no election has been held under the federal regulations and it is shown that many more than a bare majority have indicated a desire not to organize and join the union, it would be an "unfair labor practice" to compel Fairlawn Meats to compel its employees to join a union contrary to their already expressed wishes.

It is the judgment of this court, that, since the picketing herein was for organizational purposes only, and not to secure a settlement of grievances among the employees, and since the picketing in part was done on land owned by or under lease to Fairlawn Meats, and since the Union by [fol. 315] threats and coercion instituted a secondary boycott against Fairlawn Meats, the picketing, although not accompanied by violence, was nevertheless unlawful under the announced policy in Ohio.

The injunction heretofore granted by the trial court shall be continued, and this court will enter the same order with respect to such injunction as was entered by the trial court.

Decree for the appellee, at the costs of appellants.

Stevens, P. J., and Doyle, J., concur.

* * * * * * *

[fol. 316] IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

MOTION FOR NEW TRIAL OR, IN ALTERNATIVE, TO CERTIFY RECORD TO SUPREME COURT—Filed May 31, 1955

Now come Defendant-Appellants in the above cause by its attorneys and respectfully move this Court for a new trial for the reasons that the Court in its decision of May 18, 1955:

(1) denied applicability of the Labor Management Relations Act, 1947, and asserted jurisdiction, and yet inconsistent therewith, found defendants committed unfair labor practices; (2) failed to recognize the supremacy of federal law as annunciated in *Garner* vs. *Teamsters Union*, 346 U. S. 485; *Weber* vs. *Anheuser-Busch, Inc.* U. S. March 28, 1955, CCH, Para. 69064, and *Grimes & Hauer* vs. *Pollock* 163 Ohio St. (May 25, 1955); and (3) found a secondary boycott to have been engaged in without attributing responsibility to defendants where the transcript of testimony shows defendants' innocence of such conduct, and for other reasons apparent on the record, or in the alternative, to have this Court issue a Certificate of Conflict in this cause, certifying the same to the Supreme Court of [fol. 317] the State of Ohio on the ground that the judgment of this Court in accordance with its decision of May 18, 1955, affirming the trial court, conflicts with the judgments of the Court of Appeals of Hamilton County in *Friedman* vs. *International Alliance* 86 Ohio App. 189, the Court of Appeals of Mahoning County in *Donofrio* vs. *Bartenders Local et al.* (unreported), Motion to Certify refused, Supreme Court of Ohio, No. 32976; and, the Court

of Appeals, Butler County, in *Jacobs* v. *Clearing Machine Corp.* 68 Ohio Law Abs. 269.

A brief in support of this motion is attached hereto and made a part hereof.

(S) Smoot and Riemer, Attorneys for Defendants-Appellants.

[File endorsement omitted.]

[fol. 318] IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

JOURNAL ENTRY CONTAINING DECREE—June 4, 1955

1. This cause came on for hearing in this Court, de novo, on questions of law and fact. By agreement of the parties, the cause was heard on the transcript of testimony taken in the trial court, together with the exhibits there introduced, the briefs and arguments of counsel for the parties, and the issues having been duly tried, and the Court, after due consideration and deliberation, having rendered its opinion in which a decision in favor of the plaintiff-appellee and against the defendants-appellants is duly made, the Court finds on the issues joined in favor of the plaintiff-appellee and against the defendants-appellants and that the prayer of the petition of plaintiff-appellee should be granted.

2. It is, therefore, Ordered and Decreed that the defendants and each of them and the officers, directors and members of the defendant union and all persons acting with the defendants or in concert with the defendants be and they hereby are enjoined and restrained from:

(1) Picketing the stores and places of business of the plaintiff and from congregating, standing or hav-[fol. 319] ing individuals congregate and stand near the premises where plaintiff's stores are located and from coercing, threatening, intimidating or turning aside against their will those who would go to the plaintiff's store to sell, purchase or deliver goods, or any of the employees of the Plaintiff.

(2) Trespassing upon plaintiff's property.

(3) Compelling or inducing, or attempting to compel or induce by threats, intimidation, persuasion, force or violence any of plaintiff's suppliers of merchandise to refuse or fail to sell and deliver merchandise to the plaintiff.

(4) Warning plaintiff's employees, agents or officers, or persons about to become such, on the families of either, that they will suffer or be likely to suffer any of the wrongs or injuries enjoined in this order, if they enter plaintiff's employment or continue therein.

(5) Aiding or advising any person to commit any of said wrongs or injuries.

The defendants-appellants shall pay the costs herein for which sum judgment is awarded plaintiff-appellee. To all of which the defendants-appellants except.

(S) Oscar Hunsicker, Judge, for the Court (handwritten).

[File endorsement omitted]

[fol. 320] IN THE COURT OF APPEALS
NINTH JUDICIAL CIRCUIT

February Term, 1955.

JOURNAL ENTRY DENYING MOTION FOR NEW TRIAL TO CERTIFY —June 4, 1955

This cause came on for hearing upon the motion of the appellants for a new trial, or, in the alternative, to certify the record to the Supreme Court, which motion was heretofore filed and has this day been refiled, and was submitted to the Court.

Upon consideration whereof, said motion, and each branch thereof, is hereby overruled.

To which ruling said appellants except.

It is now ordered that this cause be remanded to the Court of Common Pleas of Summit County, Ohio, for execution, and for all further proceedings herein,

All at the costs of said appellants.
Approved:
(S) Oscar Hunsicker, Judge—For the Court.

[File endorsement omitted]

[fol. 321] IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT OF OHIO

NOTICE OF APPEAL—Filed June 17, 1955

The above named defendants-appellants hereby give notice of appeal to the Supreme Court of Ohio from a judgment entered in the Court of Appeals in the above entitled cause on the 4th day of June 1955. Said appeal is on questions of law and is taken to the Supreme Court as of right:
(a) In a cause involving, among other questions, a debatable constitutional question;
(b) On condition that the Motion to Certify be allowed by the Supreme Court.
Said judgment, exclusive of the caption thereof, reads as follows:
1. This cause came on for hearing in this Court, de novo, on questions of law and fact. By agreement of the parties, the cause was heard on the transcript of testimony taken in the trial court, together with the exhibits there introduced the briefs and arguments of counsel for the parties, and the issues having been duly tried, and the Court, after due consideration and deliberation, having rendered its [fol. 322] opinion in which a decision in favor of the plaintiff-appellee and against the defendants-appellants is duly made, the Court finds on the issues joined in favor of the plaintiff-appellee and against the defendants-appellants that the prayer of the petition of plaintiff-appellee should be granted.
2. It is, therefore, Ordered and Decreed that the defendants and each of them and the officers, directors and members of the defendant union and all persons acting with the defendants or in concert with the defendants be and they hereby are enjoined and restrained from: (1) Picketing the stores and places of business of the plaintiff and from

congregating, standing or having individuals congregate and stand near the premises where plaintiff's stores are located and from coercing, threatening, intimidating or turning aside against their will those who would go to the plaintiff's store to sell, purchase or deliver goods, or any of the employees of the plaintiff. (2) Trespassing upon plaintiff's property. (3) Compelling or inducing, or attempting to compel or induce by threats, intimidation, persuasion, force or violence any of plaintiff's suppliers of merchandise to refuse or fail to sell and deliver merchandise to the plaintiff. (4) Warning plaintiff's employees, agents or officers, or persons about to become such, or the families of either that they will suffer or be likely to suffer any of the wrongs or injuries enjoined in this order, if they enter plaintiff's employment or continue [fol. 323] therein. (5) Aiding or advising any person to commit any of said wrongs or injuries.

The defendants-appellants shall pay the costs herein for which sum judgment is awarded plaintiff-appellee. To all of which the defendants-appellants except.

(S) Oscar Hunsicker, Judge.

* * * * * * *

(S) Smoot and Riemer, Attorneys for Defendants-Appellants, Mortimer Riemer, of Counsel.

[File endorsement omitted]

[fol. 324] IN THE SUPREME COURT OF OHIO

MOTION TO CERTIFY—Filed June 27, 1955

Now comes, Amalgamated Meat Cutters and Butcher Workmen of North America, Local No. 427, et al., Appellants herein and represent that on the fourth day of June, 1955, in an action pending in the Court of Appeals of Summit County, Ninth Judicial District, said Court rendered a decree affirming a decree of permanent injunction theretofore rendered in favor of the Appellee by the Common Pleas Court of said County and enter final judgment for Plaintiff-Appellee herein.

Appellants further represent that it has heretofore filed Notice of Appeal in the Court of Appeals and a similar Notice in this Court as required by law, and that said case is one of both public and great general interest; that it involves debatable constitutional questions; that error prejudicial to these Appellants has intervened in the proceedings had in the said Court of Appeals; and that said Judgment is in conflict with the Judgments of the Court of Appeals of Mahoning County in *Donofrio* v. *Bartenders* [fol. 325] *Local* (Common Pleas No. 132350, Mahoning County, Motion to Certify to the Supreme Court refused, No. 32976) and of the Court of Appeals of Butler County in Jacobs v. Clearing Machine Corp., 65 Ohio Lab Abs. 269.

Wherefore, said Appellants make application for an order directing said Court of Appeals to Certify its record to the Supreme Court.

(S) Smoot and Riemer, Attorneys for Defendants-Appellants, Mortimer Riemer, of Counsel.

[File endorsement omitted]

[fol. 326] IN THE SUPREME COURT OF OHIO

January Term, 1955

Case No. 34542

Title of Case

FAIRLAWN MEATS, INC., Plaintiff-Appellee,

v.

AMALGAMATED MEAT CUTTERS AND BUTCHERS WORKMEN OF NORTH AMERICA, LOCAL No. 427, A. F. L., et al., Defendants-Appellants.

Attorneys: Stanley Denlinger, First National Tower; Ray McGowan, Robert Sheck, Second National Bldg., Akron, Ohio.

Smoot & Riemer, Bulkley Building, Cleveland, Ohio.

Action: Appeal from the Court of Appeals of Summit County.

Motion for an Order Directing the Court of Appeals of Summit County to Certify Its Record.

JOURNAL ENTRIES OF DENIAL OF MOTION TO CERTIFY, DISMISSAL OF APPEAL AND DENIAL OF APPLICATION FOR REHEARING.

* * * * * * *

[fol. 327] Journal No. 41, p. 613.

Wednesday, November 9, 1955

Motion for an Order Directing the Court of Appeals of Summit County to Certify Its Record:

It is ordered by the Court that this motion be, and the same hereby is, overruled.

Journal No. 41, p. 616. Wednesday, November 8, 1955

Appeal From the Court of Appeals of Summit County:

This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Summit County, upon the motion of the appellee to dismiss the appeal, filed as of right herein, and was argued by counsel.

On consideration whereof, it is ordered and adjudged that said appeal be, and the same hereby is, dismissed sua sponte for the reason no debatable constitutional question [fol. 328] is involved in said cause.

It is further ordered and adjudged that the appellee recover from the appellants its costs herein expended, taxed at $.....

Ordered, That a special mandate be sent the Court of Common Pleas of Summit County, to carry this judgment into Execution.

Ordered, That a copy of this entry be certified to the Clerk of the Court of Appeals of Summit County, "for entry".

Journal No. 41, p. 636. Wednesday, December 7, 1955.

Rehearing Docket:

Upon consideration of the above application for rehearing, it is ordered by the Court that rehearing be, and the same hereby is, denied.

[fols. 329-330] IN THE SUPREME COURT OF OHIO

* * * * * * *

APPLICATION FOR REHEARING—Filed November 22, 1955

Now comes the Defendants-Appellants by their attorneys, and make application for a rehearing of the above captioned action for the reasons stated below. Argument is limited to the specific reasons contained herein.

Rehearing should be granted in the instant case for the following reasons:

1. In refusing appeal this Court allows a Court of Appeals decision to stand which is in conflict with *Grimes & Hauer, Inc.* v. *Pollock, et al.*, 163 Ohio S., 372, in controversies coming within the provisions of the National Labor Relations Act and which affect commerce.

2. In refusing appeal this Court allows a Court of Appeals decision to stand which denies to employees the right to strike to redress their grievances with their own employer.

3. In refusing the appeal this Court allows the erroneous judgment of the lower court to stand on matters of great public interest and concern without settling important questions of Ohio law presented by this appeal.

A brief in support of this application for rehearing is attached hereto.

Respectfully submitted, (S) Smoot and Riemer, Attorneys for Defendants-Appellants.

[File endorsement omitted]

[fol. 331] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 332] PLAINTIFF'S EXHIBIT 2-A

Wage Rates Negotiated by Meat Cutters Local Union 427 With Cleveland Food Industry Committee

The following minimum rates and contract revisions ratified by membership meeting June 23, 1953, are effective from June 1, 1953.

	Weekly	*Hourly*
Meat Department Heads—Super Markets	$95.00	$2.375
Master Markets or other large self-service markets		
Meat Department Heads	86.00	2.15
Service Stores		
Back Room Cutter, Box Man	84.00	2.10
(Those in above three classifications will receive above or a minimum of $5.00 per week.)		
Journeyman—(Less than 50% of time cutting)	81.00	2.025
(Those in above classification will receive a minimum of $4.00 per week or the minimum rate whichever is the greater.)		
Apprentices		
1st 3 months	48.50	1.21
2nd 3 months	52.50	1.31
2nd 6 months	54.50	1.36
3rd 6 months	57.50	1.44
4th 6 months	61.50	1.54
5th 6 months	66.50	1.66
6th 6 months	68.50	1.71
Females		
1st 3 months	42.50	1.06
Next 6 months (3rd to 9th)	45.50	1.14
Next 9 months (9th to 18th)	51.50	1.285
Next 6 months (18th to 24th)	55.50	1.385

Over 24 months	60.50	1.51
(Full-time Female employees now receiving $58.28 or more per week will receive a minimum increase of $3.00 per week.)		

[fol. 333] *Part-Time:*

Part-time help rates are the hourly rates shown for full-time based on the member's classification and length of service.

The new rates are to be put into effect June 29, 1953. Back-pay is to be paid within a reasonable period.

Contract has been revised as follows:

Par. 8. Regular work days for the 40 hour work week in Cuyahoga County:

Monday, Tuesday, Wednesday, Thursday—9:00 A. M. to 6:00 P. M. Friday and Saturday—8:00 A. M. to 6:00 P. M.

Par. 11 Time and one-half after 40 hours in any regular work week.

Par. 17. Time and one-half after 32 hours in any holiday week.

Par. 26. Eliminate.

Back pay claims for those who changed jobs after June 1, 1953 and before July 4, 1953 must be made in writing to the companies by July 31, 1953. Send copy of written request to Union office.

Sam Pollock, President, June 29, 1953.

SP/elb

[fol. 334] PLAINTIFF'S EXHIBIT 2-B

Agreement

1. Agreement made this _____ day of _____, 1952, at Akron, Ohio, by and between _____, individually and collectively, for its members, hereinafter referred to as the Employer, and Local Union 427, Amalgamated Meat Cutters and Butcher Workmen of North America, A. F. of L., hereinafter referred to as the Union.

Recognition

2. The Employer recognizes the Union as the sole bargaining agent for all employees in the meat departments of the Employer located in the Counties of Cuyahoga, Lake, Geauga, Ashtabula, Lorain, Medina, Erie, Ashland, Richland, Huron, Summit, Stark and Portage.

Union Shop

3. All employees covered by this agreement shall, within 30 days after the execution of this agreement or 30 days after their employment, whichever is later, during the term of this agreement, become members of the Union and remain members of the Union in good standing during the life of this agreement. The Employer agrees to notify the Union of any new help.

Check-Off of Union Dues

4. The Employer shall, for the term of this agreement, deduct initiation fees and Union dues from the first pay of each month of employees who are members of the Union and who individually and voluntarily certify in writing authorization for such deductions. The Employer shall remit all sums deducted in this manner to the Union before the fifteenth (15th) day of the month for which the initiation fees and dues were collected.

Union Official Access to Store

5. The appropriate store official shall grant to any accredited Union official access to the store and to the working areas and to the areas where members of the Union are working for the purpose of satisfying himself and the company representatives that the terms of this agreement are being complied with, provided the Union official shall first advise the appropriate store official of the purpose of his visit.

[fol. 335] Regular Work Week

6. Forty-three (43) hours shall constitute the work week for all fulltime employees, Monday to Saturday, inclusive.

7. Female employees may have the option of working

on a forty-three (43) hour, five and one-half (5½) day basis, or on a forty-two (42) hour, five (5) day basis. Such employees must exercise their option in this respect within thirty (30) days after the forty-three (43) hour work week goes into effect.

8. Effective June 1, 1953, the work week shall be forty (40) hours, in any five days of any one week.

Overtime

9. Time and one-half shall be paid in excess of forty-three (43) hours in any work week.

10. If any individual employer is open after 6:00 P. M. on more than two (2) days, time and one-half shall be paid for work on those nights in excess of two (2) days during any one week for full-time help.

11. No employee shall be permitted to accept time off in lieu of overtime pay.

Sundays and Holidays

12. There shall be no work performed on Sundays and the following legal holidays, except in cases of extreme emergency to protect the property of the Employer. All work performed on Sundays or the following legal holidays shall be paid for at the rate of double time, that is, straight time, plus straight time.

13. New Year's Day; Decoration Day; Independence Day; Labor Day; Thanksgiving Day; and, Christmas Day, or days legally celebrated in lieu thereof.

Holiday Work Week

14. Thirty-five (35) hours shall constitute the work week for all employees in a week in which any of the above specified holidays shall fall. All work performed in excess of thirty-five (35) hours in any such holiday weeks shall be compensated for at the rate of time and one-half. All regular full-time employees shall be paid eight hours' pay for holidays not worked.

[fol. 336] 15. Effective June 1, 1953, thirty-two (32) hours shall constitute the work week in a week in which any of the above specified holidays shall fall.

Minimum Rates

16. The minimum rates of pay for full-time employees for the basic work week, as set out in Paragraph 6, shall be as follows:

	Weekly	*Hourly*
17. For Meat Department Heads—Super Markets, Master Markets or other large self-service markets	$89.60	$2.07
18. For Meat Department Heads—Service Stores	81.00	1.88
19. Box Man or Backroom Man. (All journeymen meat cutters working in self-service meat departments shall be classified as box men or backroom men. All journeymen meat cutters working in service meat departments, who work in the box or in the backroom better than 50% of their time, shall also be classified as box men or backroom men)	79.00	1.84
20. For Full-Time Journeymen Meat Cutters	76.40	1.78
21. For Full-Time Male Apprentices:		
1st 3 months	44.50	1.04
2nd 3 months	48.50	1.12
2nd 6 months	50.50	1.17
3rd 6 months	53.50	1.24
4th 6 months	57.50	1.34
5th 6 months	62.50	1.45
6th 6 months	64.50	1.50

After the third year, the regular journeymen meat cutter rate will apply.

[fol. 337] 22. For Full-Time Female Help:

1st 3 months	$40.50	$ .94
3 to 9 months	43.50	1.01
9 to 18 months	48.50	1.13
18 to 24 months	53.70	1.25
Over 24 months	58.70	1.37

23. Journeymen meat cutters, relieving head meat cutters one week or more, shall receive the minimum rates for the head meat cutter. However, in no event shall he suffer a decrease in wages.

Minimum Increase

24. All regular full-time employees shall receive the minimum rate for their classification or an increase of $2.00, whichever is the greater, but not both.

Part-Time Rates

25. The minimum rates of pay for part-time employees shall be pro-rated on an hourly basis.

26. Part-time employees shall be given credit for actual hours of work in arriving at their regular hourly rate.

27. Part-time employees when ordered to report for work shall be guaranteed a minimum of five (5) hours' work per day.

Service Credit

28. Employees shall receive credit for all time served under different employers in arriving at the proper wage rate.

Equal Pay for Equal Work

29. Female employees replacing male employees shall be paid the rate for male employees providing such female employees are able to perform in full the duties of male employees.

No Reduction in Pay

30. No employee shall suffer a reduction of pay as a result of the signing of this agreement.

[fol. 338]

Rest Periods

31. There shall be no split shifts or enforced rest periods, and all time in one day shall run continuously from starting to quitting time, except that all employees shall receive a paid rest period of ten (10) minutes in the morning and ten (10) minutes in the afternoon, and a lunch period of one hour on the employee's time.

Notice for Discharge and Lay-Offs

32. No full-time employee shall be discharged without three (3) days' notice or three (3) days' pay in lieu of notice. No notice or advance pay will be necessary when employees are discharged for dishonesty, drunkenness on the job or insubordination.

33. All employees shall give three (3) days' notice to the Employer. Upon failure to do so, the Union shall discipline employees.

Vacations

34. All full-time employees with one (1) year's continuous service with an individual employer shall receive one (1) week's vacation with pay.

35. All full-time employees with three (3) years' or more continuous service with an individual employer shall receive two (2) weeks' vacation with pay.

36. Part-time employees who have a continuous record of one year or more of over thirty (30) hours worked per week shall be granted vacations on the same basis as full-time employees, except that their vacation pay shall be based on the current average number of hours they have worked per week.

37. Those receiving more shall not be reduced. Employees shall become eligible for vacations on the anniversary date of employment. Vacation schedules may be changed if employee and employer are agreed.

38. Employees entitled to vacations shall leave at 8:30 A. M., Monday morning, and report to work the following Monday morning. Vacations earned are not accumulated beyond two (2) weeks in any year. Vacation money must be paid in advance.

39. If a holiday (specified in Paragraph 13) falls within an employee's scheduled vacation period, the employee will receive an extra days's pay.

[fol. 339] Health and Welfare

40. Employer herein agrees that a Health Welfare and Death Benefit Fund shall be established, which is legal under the laws of the State of Ohio, and under the laws of the United States. It is understood and agreed

by the parties hereto that no fund shall be set up on which the contributions made by employer hereunder are construed to be wages under the Federal Wage and Hour Act. Nor is any fund to be established under which the payments of the Employer are considered by any taxing authority as wages upon which withholding tax is to be paid or upon which social security contributions are to be made by Employer.

41. The fund which is to be established shall be jointly administered under a trust agreement to be executed by the parties hereto providing administration by a Board of Trustees consisting of two representatives of the Union, and two representatives of the Employer, and providing for a tie breaker. This fund shall be used to establish insurance against sickness, accident, or such other contingencies as may impair the welfare of the Union members as may be determined by the Board of Trustees.

42. Each individual employer agrees to pay monthly into the Fund the sum of One Dollar ($1.00) per week for each full-time employee on each such Employer's payroll. Each such employer shall forward on the first day of each month to the Fund a record sheet of his full-time employees for the preceding month with payment to the Fund to cover said employees. The first payment shall be due October 1, 1952 for the month of September, 1952.

Seniority

43. As to lay-offs and rehiring, the principles of seniority will apply. Seniority shall be determined on the length of service of the employee with regard to his experience and ability to perform the work.

44. In the matter of promotions and transfers from one type of work to another or from one store to another, the employer shall have the right to exercise his final judgment after giving due regard to seniority. Records on seniority shall be available to the Union at all times.

Workmen's Compensation

45. It is agreed that all meat market operators with one (1) or more employees shall carry Workmen's Com-

[351]

Defendants' Exhibit 25 + 25

NAME	ADDRESS	PHONE NO.	SEX	PLACE OF EMPLOYMENT	DATE JOINED UNION	DATE WENT ON STRIKE
Robert Vargo	1138 Sherman, Akron, O.	PA. 4-4710	M	Tallmadge, O.	12/3/53	—
Ruth E. Smith	3176 Shade Rd., Akron, O.	None	F	W. Richfield	9/25/53	— 2/4/54
David Rodacker	2039 Front St., Cuyahoga Falls	SW. 4-7255	M	Tallmadge, O.	12/3/53	— 2/20/54
Therom W. O'Dell	1491 Chippewa Ave., Akron	RE. 3-3819	M	Tallmadge, O.	12/3/53	— ∞
Mary J. Horn	Box 162, W. Richfield, O.	8230	F	W. Richfield	10/23/53	— 2/4/54
Violet Guthrie	Route 176, W. Richfield, O.		F	W. Richfield	2/1/54	— 2/4/54
Ada Kish	118 W. Mildred St., Akron, O.	FR. 6-3329	F	Tallmadge, O.	12/3/53	— —
Margaret E. Conley	Box 122, Bath, Ohio		F	W. Richfield	12/9/53	— 2/4/54
William M Minto	R.D. #1, Stein Rd., Peninsula, O.		M	W. Richfield	2/14/54	— 2/4/54
John Zuchniak	1005 Annabelle Dr., Akron, O.		M	Tallmadge	7/17/50	— —
Max Krausman	3422 Wyoga Lake Rd., Cuyahoga Falls	WA. 8-9890	M	W. Market St.	8/5/53	— (2/4/54 - 2/12/54)
Herschel Ramsey	1294 Inman Ave., Akron, O.		M	Tallmadge	5/13/49	— —
Joe Lancaster	399 1/2 Bishop St., Akron		M	Tallmadge	9/4/45	— —
Paul Levine	953 Hartford Ave., Akron	UN. 4-3575	M	W. Market St.	8/5/53	— —
Jay Edwin Garver	1842 Collinwood, Akron 10			Tallmadge	5/7/47	— —
LeRoy J. Smith	5046 Alger Rd., W. Richfield	230	M	W. Richfield	12/2/53	— 2/4/54
Martin Mermelstein	1447 Fernwood Dr., Akron, O.		M	Tallmadge	5/2/51	— —
William Brigham	876 Bellevue Ave., Akron		M	W. Market	1/25/50	— —
Marietta Channell	410 Fuller Ave., Akron, O.	PA. 4-0850	F	W. Market St.	2/9/51	— (2/4/54 to 2/12/54)
Robert Hurst transferred from [illegible]				W Richfield	3/10/47 L.U. 347	Stayed in —

John Zuchniak	[illegible]		M	Tallmadge	7/17/50	—
Max Krausman	3422 Wyoga Lake Rd., Cuyahoga Falls	WA. 8-9890	M	W. Market St.	8/5/53	— (2/4/54 - 2/12/54)
Herschel Ramsey	1294 Inman Ave., Akron, O.		M	Tallmadge	5/13/49	— —
Joe Lancaster	399 1/2 Bishop St., Akron		M	Tallmadge	9/4/45	— —
Paul Levine	953 Hartford Ave., Akron	UN. 4-3575	M	W. Market St.	8/5/53	— —
Jay Edwin Garver	1842 Collinwood, Akron 10			Tallmadge	5/7/47	— —
LeRoy J. Smith	5046 Alger Rd., W. Richfield	230	M	W. Richfield	12/2/53	— 2/4/54
Martin Mermelstein	1447 Fernwood Dr., Akron, O.		M	Tallmadge	5/2/51	— —
William Brigham	876 Bellevue Ave., Akron		M	W. Market	1/25/50	— —
Marietta Channell	410 Fuller Ave., Akron, O.	PA. 4-0850	F	W. Market St.	2/9/51	— (2/4/54 to 2/12/54)
Robert Hurst transferred from Local 347 - Charleston, W. Va.				W Richfield	3/10/47 L.U. 347	Stayed in —
Delbert Brown transferred from Local 500 - Cleveland, O. - 12/31/53				W. Richfield, O. (L.U. 500)		2/4/54
Helen Mayo	653 Garfield St. Akron		F.	Tallmadge, O.	2/26/54	3/8/54
Thomas Tandarich	1186 Andrus St.		M.	Tallmadge, O.	3/2/54	3/8/54
Don Herbruck	1191 Wilbur Ave.		M.	"	3/2/54	3/8/54
[illegible]	CARPENTER 617 [illegible]		M.	"	1/20/54	2/4/54
[illegible]	[illegible] 1201 Grant St				1/31/54	2/4/54

(251)

1884

pensation under the Workmen's Compensation Law of Ohio.

[fol. 340] Arbitration

46. Should there be a dispute concerning the terms of the agreement or their applications in the meat departments of the employer, which cannot be settled by a representative of the employer and a represnetative of the Union, the matter of disagreement shall be submitted to a Board of Arbitration consisting of two (2) men representing the employer, two (2) men representing the Union, and one (1) disinterested arbiter selected by mutual agreement. The decision of the Board of Arbitration shall be rendered within thirty (30) days of the date of dispute being submitted for ar*gib*t-ation and the decision of the Board of Arbitration shall be final and binding.

Wage Stabilization Board Approval

47. The Employer agrees to join with the Union in an application to the Wage Stabilization Board for the approval of this contract. It is clearly understood between the parties that all increases in wages will be effective as of ....., 1952. It is also agreed between the parties that the reduction in hours shall become effective upon approval by the Wage Stabilization Board.

48. The Employer further agrees to join with the Union, in a request to the Wage Stabilization Board, for the approval of the Health and Welfare Fund. This fund will be retroactive, when approved, to .....

No Strike—No Lockout

49. There shall be no strikes, lockouts, stoppage of work or picketing during the life of this agreement.

Management Rights

50. The Employer shall retain all management rights and functions it possessed prior to entering into a contract with this Union, except such rights as are relinquished and restricted in this contract.

Termination

51. This agreement shall be effective as of ....., 1952 and shall expire ....., and shall automatically continue from year to year unless notice is given in writing by either party not less than sixty (60) days prior to the expiration date hereof, except as hereinafter provided.

[fol. 341]

Wage Reopener

52. Providing they are approved by the Wage Stabilization Board, and to the extent that they are approved, the new wage rates, shown herein, when placed in effect in accordance with Paragraph 16 through 22 shall be continued in effect during the remainder of the term of this agreement, provided, however, that with respect to wage rates, this agreement may be reopened on ....., by a sixty day prior written notice given by either party to the other party; and provided further that in the event such a notice is given, negotiations shall proceed promptly to a mutual agreement or until negotiations are terminated by either party on five days' written notice; and provided, further that in the event such negotiations are thus terminated by either party because no agreement has been reached, a strike or a lockout shall not then be a violation of this agreement. When such wage dispute is settled by agreement of the parties, this entire agreement, as modified or supplemented, shall be fully reinstated; and provided further that, except by mutual consent given at the time, no wage dispute shall be subject to arbitration.

The Union	For the Employer
.....	.....
International Representative	
.....	.....
Committeeman	
.....	.....
Committeeman	
.....	.....
Committeeman	
.....	.....
Committeeman	

[fol. 342] PLAINTIFF'S EXHIBIT 5

I Thomas Tandarich on my own free will do hereby resign my job at Ekers Packing House Market as of March 6, 1954.

(S) Thomas Tandarich.

Witness: (S.) Edward C. Gerry, 1078 Valdes Ave., Akron. (S) Howard Schlegel, 1334 Meriline, Cuyahoga Falls.

[fol. 343] PLAINTIFF'S EXHIBIT 10

(Letterhead)
Earl C. Gibbs, Inc.
Wholesale Meats

Phone: OLympic 1-1550
3378 West 65th Street
Cleveland 2, Ohio

Member
American Meat Institute

March 5, 1954

To whom it may concern:

B. H. Ekers has been a customer of ours for over 30 years, and is a valued account.

We recently were advised by our union president that it would be against our best interest, as far as good relationship with our union is concerned, to continue to sell to Mr. Ekers.

In order to preserve our good relationship with the union and its members, our workers, we have abided by their request.

Very truly yours,

Earl C. Gibbs, Inc.
(S) Earl M. Gibbs, Vice President.

EMG/gcl

[fol. 344] PLAINTIFF'S EXHIBIT 11

Feb. 27/54

Fairlawn Meat Inc.

Gentlemen!

This is to state that I am hereby resigning from your employ of my own free will as of today.

(S) Walter D. Carpenter, 629 S. Prospect St., Ravenna, Ohio.

[fol. 345] PLAINTIFF'S EXHIBIT 12

Akron, Ohio.

February 10, 1954

We, the undersigned, employees of Fairlawn Meats, Inc., hereby certify that there is no dispute or disagreement between us and our employer, Fairlawn Meats, Inc. as to hours of work, rate of pay, or any other conditions effecting our employment and we are not on a strike against our employer, and we are not in favor of our employer signing any agreement that will force or compel us to join any union.

Name:	Name:
1. John W. Zuchniak	1. Robert G. Vargo
2. Audra K. Kitchen	2. Jack B. Horn
3. Dorothy M. Stiles	3. Thomas R. Dutton
4. Richard L. Gromen	4. William Horn
5. Edward C. Gerry	5. June Moyer
6. Thomas Tandarich	6. Howard Schlegel
7. Hurschel E. Ramsey	7. Henry Atkinson
8. Harold Barnett	8. Mary R. Gerry
9. David D. Rodocker	9. Frances F. Barrett
10. Marie Lukocwich	10. Dennis Brown
11. R. H. Thursby	11. Margaret Carlisle
12. Joe F. Lancaster	12. Louis Mueller
13. Jay E. Gasver	13. Don Herbruck
14. Martin Mermelstein	14. Rena Barnett
15. T. W. O'Dell	15.
16. Helen Mayo	16.
17. Ada Kish	17.

[fol. 346] Akron, Ohio.

February 10, 1954

We, the undersigned, employees of Fairlawn Meats, Inc., hereby certify that there is no dispute or disagreement between us and our employer, Fairlawn Meats, Inc. as to hours of work, rate of pay, or any other conditions effecting our employment and we are not on a strike against our employer, and we are not in favor of our employer signing any agreement that will force or compel us to join any union.

Name:

1. Eugene B. Moyer
2. Robert W. Hurst
3. Cecil F. Miller
4. Paul Levine
5. William H. Brigham
6. Arthur C. Sell
7. Max Krausman
8. George White
9. Mary Brigham
10. Anthony Panella

[fol. 347] PLAINTIFF'S EXHIBIT 16

I Robert G. Vargo on my own free will do hereby resign my job at Ekers Packing House Market as of March 6, 1954.

(S) Robert Vargo.

Witness: (S.) Edward C. Gerry, 1078 Valdes Ave., Akron. (S) Howard Schlegel, 1334 Meriline, Cuyahoga Falls.

[fol. 348] PLAINTIFF'S EXHIBIT 17

I Donald Herbruck on my own free will do hereby resign my job at Ekers Packing House Market as of March 6, 1954.

(S) Don Herbruck.

Witness: (S) Edward C. Gerry, 1078 Valdes Ave., Akron. (S) Howard Schlegel, 1334 Meriline, Cuyahoga Falls.

[fol. 349] DEFENDANTS' EXHIBIT 15-A

Earl C. Gibbs, Inc.

Summary of Cattle Slaughtered
and
Cattle Purchased—Ohio and out of State of Ohio

September 28, 1953 to December 31, 1953

Number Slaughtered for Period	Number of Head of Cattle
Steers and Cows	10,665
Bulls	3,110
Condemned	11
Killed for Others	47
Total Slaughtered	13,833

Cattle Purchased		Percentage
Within State of Ohio	5,484	38.50
Outside State of Ohio	8,758	61.50
Total	14,242	100.00

[fol. 350] DEFENDANTS' EXHIBIT 15-B

Earl C. Gibbs, Inc.

Account with Fairlawn Meats, Inc.
2246 West Market Street, Akron, Ohio

Summary of Charges for Months Purchases Year 1953

Month of		Total Charges
January	1953	$ 21,489.79
February	"	27,876.39
March	"	21,410.43
April	"	16,866.54
May	"	14,128.80
June	"	11,031,29
July	"	4,261.29
August	"	2,031.21
September	"	5,538.03
October	"	3,314,20
November	"	7,694.95
December	"	10,430.98
Total		$146,073.90

Here follows Photolithograph, side folio 351

[fol. 352] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed May 7, 1956

The petition herein for a writ of certiorari to the Supreme Court of the State of Ohio is granted, and the case is transferred to the summary calendar. The Solicitor General is invited to file a brief in this case on behalf of the National Labor Relations Board.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(793-0)

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No. ~~298~~ 41

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, LOCAL NO. 427, AFL, ET AL.,

Petitioners,

vs.

FAIRLAWN MEATS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

JOSEPH M. JACOBS,
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Chicago 6, Illinois,

MORTIMER RIEMER,
514 Bulkley Building,
Cleveland 15, Ohio,
Counsel for Petitioners.

INDEX.

	PAGE
Citations to opinions below	1
Jurisdiction	2
Questions presented	3
Statutes involved	4
Statement	5
A. The labor dispute	5
B. Proceedings below	7
1. The interstate commerce facts	8
2. The union majority issue	9
3. The trespass issue	9
4. The secondary boycott issue	11
C. Opinions of the courts below	11
Specifications of errors to be urged	15
Reasons for granting the writ	16
Conclusion	24
Appendix A—Relevant provisions of NLRA	25
Appendix B—Opinion of Court of Common Pleas	27
Appendix C—Journal entry of the Court of Common Pleas	36
Appendix D—Opinion of the Court of Appeals	38
Appendix E—Journal entry of the Court of Appeals	47
Appendix F—Supreme Court of Ohio order	49

Authorities Cited.

Cases.

Algoma Plywood Co. v. Wisconsin Board, 336 U. S. 301 19

Amalgamated Association v. Wisconsin Board, 340 U. S. 383 ..... 16, 20, 22

Amazon Cotton Mill Co. v. Textile Workers Union, 167 F. 2d 183 19

Brandeis & Sons v. National Labor Relations Board, 142 F. 2d 977, cert. den. 323 U. S. 751 17

Breeding Transfer Co., 110 NLRB 493 20

Building Trades v. Bonito, ... Nev. ....., 280 P. 2d 295 19

Building Trades Council v. Kinard Construction Co., 346 U. S. 933 ..... 18, 21

Busch & Sons v. Retail Union, 15 N. J. 226, 104 A. 2d 448 19

Cain, Brogden & Cain v. Teamsters Local 47, ... Tex. ....., 285 S. W. 2d 942 19

Columbia Southern Chemical Corp., 110 NLRB 206 ... 23

Federal Dairy Co., 91 NLRB 638 18

Food Basket, Inc. v. Amalgamated Meat Cutters and Butcher Workmen of North America, 29 CCH Labor Cases ¶ 69,561 18

Garmon v. Bldg. Trades Council, ... Cal. 2d ....., 291 P. 2d 1 19

Garner v. Teamsters Union, 346 U. S. 485 21

Graybar Electric Company, Inc. v. Automotive, Petroleum & Allied Industries Employees Union, 37 LRRM 2556 19

Grimes & Hauer, Inc. v. Pollock, 163 O. S. 372, 127 N. E. 2d 203, cert. den., 350 U. S. 900 16

Hague v. CIO, 307 U. S. 496 22

Hill v. Florida, 325 U. S. 538 22

Hogue & Knott Supermarkets, 110 NLRB 543 12

International Rice Milling Co. v. National Labor Relations Board, 341 U. S. 665 23

International Union v. O'Brien, 339 U. S. 454 ..... 22, 23

Local Union 25 v. New York, New Haven & H. R. Co., 76 S. Ct. 227 12

Marsh v. Alabama, 326 U. S. 501 22

Marshall Field & Co. v. National Labor Relations Board, 200 F. 2d 375 23

Matthews v. Huwe, 269 U. S. 262 2

NLRB v. Associated Musicians, 226 F. 2d 900 12

National Labor Relations Board v. Cowell Portland Cement Co., 108 F. 2d 198 17

National Labor Relations Board v. Daboll, 216 F. 2d 143, cert. den., 348 U. S. 917 ..... 17, 18

National Labor Relations Board v. Denver Bldg. & Construction Trades Council, 341 U. S. 675 ..... 16, 17-18, 23

National Labor Relations Board v. El Dorado Water Co., 195 F. 2d 950 17

National Labor Relations Board v. Fainblatt, 306 U. S. 601 16

National Labor Relations Board v. Seven Up Bottling Co., 196 F. 2d 424, aff'd sub silentio, 344 U. S. 344 17

National Labor Relations Board v. Stoller, 207 F. 2d 305, cert. den., 347 U. S. 919 17

New York State Board v. Wags Transportation System, 139 N. Y. S. 2d 731, aff'd on other grounds, 84 App. Div. 883, 134 N. Y. S. 2d 603 19

Punch Press Repair Corp., 89 NLRB 614 20
Retail Clerks Local No. 1564 v. Your Food Stores, 225 F. 2d 659 ..... 17, 18, 23
Santa Cruz Packing Co. v. National Labor Relations Board, 303 U. S. 453 17
Schneider v. State, 308 U. S. 147 ..... 22, 23
School District v. Trades Council, 37 LRRM 2232 19
Thomas v. Collins, 323 U. S. 516 22
Tumey v. Ohio, 273 U. S. 510 2
Universal Car Co. v. Ass'n of Machinists, 35 LRRM 2087 18-19
Weber v. Anheuser-Busch, Inc., 348 U. S. 468 22
Wisconsin Board v. Teamsters Union, 267 Wis. 356, 66 N. W. 2d 318 ..... 18, 23

U. S. Constitution.

Article I, Section 9, Paragraph 3 4
Article VI, Section 2 4
Amendment XIV 22, 23

Statutes.

National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151 et seq.) ..... 4 passim
Sec. 7, 29 U. S. C. 157 ..... 3 passim
Sec. 8(a)(1), 29 U. S. C. 158(a)(1) 4
Sec. 8(b)(2), 29 U. S. C. 158(b)(2) 4
Sec. 8(b)(4)(A), 29 U. S. C. 158(b)(4)(A) 4
Sec. 10(a), 29 U. S. C. 160(a) ..... 4, 15 passim
Sec. 13, 29 U. S. C. 163 ..... 3 passim

Legislative Materials.

Cong. Rev. Vol. 99 21
Cong. Rec. Vol. 100 21
S. 1264, 83rd Cong. 1st Sess. 21
S. 2218, 83rd Cong. 1st Sess. 21
S. 2650, 83rd Cong. 2d Sess. 21
S. Rep. No. 986, 80th Cong., 2d Sess. Pt. I 21
S. Rep. No. 1211, 83rd Cong. 2d Sess. 21

Miscellaneous Materials.

Allied Plans Biggest Network of Suburban Shopping Centers, Business Week, Jan. 15, 1955, p. 62 23
Builder Owner of Largest Shopping Center, Fortune, May, 1954, p. 44 23
Cutraters Move to Suburbs, Business Week, Jan. 22, 1955, p. 47 23
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NLRB, Amicus Curiae Brief, Montgomery Bldg. & Construction Trades Council v. Ledbetter Erection Co., Inc., No. 43, October Term, 1952 ..... 19, 20

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NLRB Press Release 445, July 1, 1954 12

NLRB, 13 Ann. Rep. 21

Turnbull, Federal-State Jurisdictional Problems, 7 Labor Law Journal 5 22

United States, Amicus Curiae Brief, Bethlehem Steel Company v. New York State Labor Relations Board, Nos. 55, 76, October Term, 1946 20

Whitney, NLRB Jurisdictional Policies and the Federal State Relationship, 6 Labor Law Journal 3 22

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. .....

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, LOCAL NO. 427, AFL, ET AL.,

Petitioners,

vs.

FAIRLAWN MEATS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

Amalgamated Meat Cutters and Butcher Workmen of North America, Local No. 427, AFL, hereinafter called the Union, Sam Pollock, President of the Union, and James Daugherty, a business representative of the Union, pray that a writ of certiorari issue to review a final judgment of the Supreme Court of Ohio entered in the above entitled case on November 9, 1955, refusing to vacate and set aside a permanent injunction against petitioners.

CITATIONS TO OPINIONS BELOW.

The opinion of the Court of Common Pleas (Tr. 100-110), is unreported and is printed in Appendix B, hereto, *infra*, pp. 27-35. The permanent injunction and decree entered by the Court of Common Pleas (Tr. 98-99), is printed in Ap-

pendix C, *infra*, pp. 36-37. The opinion of the Court of Appeals, Summit County (Tr. 82-92), is unreported and is printed in Appendix D, hereto, *infra*, pp. 38-46. The permanent injunction and decree entered by the Court of Appeals (Tr. 78-79), is printed in Appendix E, hereto, *infra*, pp. 47-48. The decision of the Supreme Court of Ohio (Tr. 4), dismissing petitioners' appeal "filed as of right herein," for the reason that "no debatable constitutional question is involved" (Tr. 5-6), is reported in 164 O. S. 285, 130 N. E. 2d 237, and is printed in Appendix F, hereto, *infra*, p. 49.

JURISDICTION.

The judgment of the Supreme Court of Ohio was entered on November 9, 1955 (Tr. 4, 5-6), p. 49, *infra*. Rehearing was denied on December 7, 1955 (Tr. 5, 6). The federal questions here urged were properly and timely presented by petitioners in their amended answer in the Court of Common Pleas (Tr. 500); in their motion to dismiss (Tr. 118-119, 123, 125, 358, 359, 493); in their appeal to the Court of Appeals, Summit County (Tr. 97); in their motion for new trial (Tr. 80-81); in their appeal as of right to the Supreme Court of Ohio (Tr. 74-76, 13-29) and in their petition for rehearing (Tr. 7). The federal questions were discussed and decided adversely to petitioners by the Court of Common Pleas and by the Court of Appeals. The Supreme Court of Ohio, without discussion, sustained the decisions below on the ground that the federal questions urged by petitioners were not "debatable" (Tr. 5-6).[1]

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1. The court thereby rejected on the merits petitioners' contentions based upon the Constitution and laws of the United States. *Tumey* v. *Ohio*, 273 U. S. 510, 515; *Matthews* v. *Huwe*, 269 U. S. 262.

QUESTIONS PRESENTED.

1. The employer involved operates three stores in the State of Ohio, at which it sells meat and meat products to retail and wholesale customers. In the course of this business, the employer annually imports directly from other states merchandise valued at over $100,000, amounting to approximately fifteen per cent of its gross purchases. The employer also causes to be imported from other states merchandise valued at approximately $200,000 annually. The first question presented is whether the employer's business operations "affect commerce" within the meaning of the National Labor Relations Act.

2. For budgetary or other policy reasons, the National Labor Relations Board refuses to assert its own jurisdiction unless the interstate operations of the employer involved in a labor dispute are substantially greater than that set forth in question numbered 1. The second question is whether the National Board's declination of jurisdiction vests in the states jurisdiction to apply to peaceful picketing arising out of a labor dispute state law or policy which duplicates, parallels or conflicts with the policies of the National Act.

3. Whether a state may, consistently with Sections 7 and 13 of the National Labor Relations Act and the Fourteenth Amendment, enjoin peaceful picketing in front of the entrance to an establishment involved in a labor dispute, on the ground that the employer owns the property on which the pickets are walking and objects to its use for picketing, where the employer owns all of the property between the store entrance and the highway and maintains the entire area for use by its customers.

STATUTES INVOLVED.

The statutory provision principally involved is Section 10(a) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., 151 *et seq.*). That section reads as follows:[2]

> The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise. *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except w' re predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

Also involved are Sections 7, 8(a)(1), 8(b)(2), 8(b)(4)(A) and 13 of the Act and Article I, Section 9, paragraph 3, Article VI, paragraph 2, and the Fourteenth Amendment to the Constitution of the United States. The other relevant provisions of the Act are reprinted in Appendix A, hereto, pp. 25-26, *infra*.

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2. Prior to the 1947 amendments, Section 10(a) read as follows: "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise."

STATEMENT.

A. The Labor Dispute.

Fairlawn Meats, Inc., hereinafter referred to as Fairlawn, operates three stores in the vicinity of Akron, Ohio, at which it sells meat and related products to both wholesale and retail customers (p. 38, *infra*, Tr. 82; 510, 212).[3] At these stores it employs approximately 50 persons (p. 38, *infra*, Tr. 82; 214).

On May 10, 1952, Fairlawn entered into a preliminary agreement in which it agreed to recognize the Union as exclusive bargaining agent for its employees and agreed to meet with the Union to negotiate a contract covering wages, hours, and other working conditions (p. 29, *infra*, Tr. 103-104; 494, 140-141). The contract proposed to Fairlawn by the Union pursuant to this agreement included a union shop provision (pp. 30, 38-39, *infra*, Tr. 83, 104; 136, 142-143).

Prolonged negotiations thereafter failed to produce agreement on substantive terms (p. 39, *infra*, Tr. 103, 83; 144, 300). On February 1, 1954, Ekers, owners of Fairlawn (Tr. 212), invited fifteen of the employees of the Tallmadge store to a meeting at a local tavern after working hours (Tr. 285-286, 291, 309-310, 427-430). There he told them that he did not want them to join the Union; that signing a contract with the Union would result in cutting down to a forty (40) hour week, and loss of overtime; and that the store would close on Sunday (Tr. 429, 146).

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3. The stores are located at 278 West Avenue, Tallmadge, Ohio, 2246 W. Market Street, Akron, Ohio, and the junction of U. S. Route 21 and State Route 176, West Richfield, Ohio (Tr. 212). As reference to individual stores is made hereafter, they are described as the Tallmadge, Market Street and West Richfield stores.

On February 2, 1954, the Union voted to authorize a strike at Fairlawn if negotiations were not successfully concluded (Tr. 154, 157-158, 201-202). The next day, Ekers told the officers of the Union that he did not care to negotiate further (pp. 29, 39, *infra*, Tr. 103, 83; 158, 372-373, 300, 202-203). On February 4, 1954, the Union established a picket line in front of the entrance of each of the three stores (Tr. 374). The pickets carried placards reading: "On strike" (p. 34, *infra*, Tr. 108).

At the time the picketing began, eighteen of Fairlawn's employees were either members of the Union or had authorized the Union to represent them (p. 38, *infra*, Tr. 83; 376). Five of the employees of the West Richfield store went on strike and participated in the picketing. (*Ibid.*) These five were later joined by two part time employees. (*Ibid.*) Two other employees, who did not picket, remained away from work until February 11, 1954 (p. 38, *infra*, Tr. 83; 377-378).

On or about February 10, 1955 (Tr. 338), Thursby, manager of the Tallmadge store (Tr. 321, 325), prepared a petition (Tr. 335-336, 337, 344) declaring that the "employees of Fairlawn Meats, Inc., hereby certify that there is no dispute or disagreement between us and our employer * * * and we are not on strike against our employer, and we are not in favor of our employer signing any agreement that will force or compel us to join any union" (p. 30, *infra*, Tr. 104; 336, P. Exh. 42). Thursby himself circulated the petition among the employees at Tallmadge and asked them to sign (Tr. 335-336, 337-338, 431, 458-459, 466). At Market Street, Brigham, the manager, called the employees together and asked them to sign (Tr. 323, 348). At Richfield, Moyer, the manager, asked the employees to sign (Tr. 322, 353-354). In all, 41 of the employees signed the petition (p. 30, *infra*, Tr. 104). After

February 19, 1954, seven employees of the Tallmadge store joined the strike (Tr. 406-407, 415-417). On March 6, 1954, Thursby called employees Vargo, Herbruck and Tandarich into his office and inquired whether, since they had joined the Union, they would like to resign their jobs. Thursby dictated resignation forms, and the employees signed them (Tr. 336-337, 341-344, 470-472; cf. 189, 279-284, 313-318).

B. Proceedings Below.

On February 8, 1954, Fairlawn filed in the Court of Common Pleas, Summit County, Ohio, a petition for permanent injunction and an application for temporary restraining order prohibiting all picketing by defendants (Tr. 510-515).[4] In its petition Fairlawn alleged that its employees have been "free from influence by the plaintiff as to whether they should deal with plaintiff individually or collectively;" that the employees had freely chosen to represent themselves individually rather than to be represented by the defendant Union; that "no bona fide labor dispute" exists between plaintiff and its employees; that the Union was engaged in a conspiracy "to compel and coerce plaintiff to in turn coerce and compel his employees * * * to become members of * * * defendant union"; and that pursuant to that conspiracy defendant had "caused a number of individuals to picket the meat markets." (*Ibid.*) The defendants removed the case to the United States District Court for the Northern District of Ohio, Eastern Division, and in that court filed a motion to dismiss, alleging *inter alia*, that the state court was without jurisdiction to enter-

4. Upon preliminary hearing, the trial court granted a temporary injunction restraining picketing at the Tallmadge and Market Street stores, but denied relief against picketing at the West Richfield store on the theory that at the latter store employees had left work to go on strike while at the former stores they had not (Tr. 506-507).

tain the petition or to grant any of the relief requested because the subject matter of the action had been preempted by Congress in the National Labor Relations Act (Tr. 504-505). The district court, finding prerequisites of removal jurisdiction wanting, remanded to the state court (Tr. 503).

Following the remand, defendant Union filed in the Court of Common Pleas an amended answer, alleging, *inter alia*, that Fairlawn's business operations affected interstate commerce within the meaning of the National Labor Relations Act; that the controversy arose out of a labor dispute within the meaning of that Act (Tr. 498-499); that the National Board had exclusive jurisdiction to hear and determine the matters complained of, and that the state court was deprived by the National Act of jurisdiction to entertain the action (Tr. 500). In its reply to the amended answer, plaintiff denied that the National Board's jurisdiction was exclusive and asserted that the state court had full jurisdiction (Tr. 495). The reply further alleged that defendants had engaged in a "secondary boycott" by inducing plaintiff's chief supplier of meat, pursuant to threats, to refuse to sell meat to plaintiff (*Ibid*).

1. The Interstate Commerce Facts.

The uncontroverted evidence shows that Fairlawn annually purchases for resale to its retail and wholesale customers merchandise valued at between $750,000 and $1,000,000 (p. 29, *infra*, Tr. 102; 217). Its purchases of meat and other supplies from June, 1952 to June, 1953, exceeded $873,000 (Tr. 249-258). Of this amount, merchandise valued at over $103,000, was shipped directly to Fairlawn from outside the State of Ohio (Tr. 216, 262-263).[5]

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5. In a single month prior to the strike, Fairlawn purchased merchandise valued in excess of $73,000, of which almost $12,000 represented direct out-of-state shipments (Tr. 264).

Ekers admitted that approximately fifteen percent of Fairlawn's total purchases are shipped to it directly from outside Ohio (Tr. 216, 217). Fairlawn's principal suppliers of dressed beef are the Gibbs and Peerless Packing companies in Cleveland, Ohio (Tr. 216, 223). During 1953, Peerless sold to Fairlawn dressed beef valued at over $221,000 (Tr. 477). More than half of the cattle from which Peerless processed this dressed beef was shipped to Peerless from other states (Tr. 477-479). During 1953, Fairlawn purchased over $146,000 of merchandise from Gibbs (Tr. 331). Gibbs, likewise, imports from other states the major portion of the cattle which it slaughters and dresses for sale to customers like Fairlawn (Tr. 327-328, 330).

2. The Union Majority Issue.

In addition to the evidence tending to show employer interference, pp. 6-7, *supra*, cf. p. 39, *infra*, Tr. 83, the Union, without waiving its jurisdictional objection (p. 40, *infra*, Tr. 84), adduced evidence tending to show that by the time of the trial approximately twenty-six of Fairlawn's employees had either joined the Union or authorized it to represent them (Tr. 402-407, 415, 417, cf. Tr. 399-400, D. Exh. 25).

3. The Trespass Issue.

Fairlawn owns approximately 200 feet of property on the east side of State Route 21 in Richfield Township on which the West Richfield store is located (Tr. 212, 224-225). The store is set back approximately 50 feet from the curb line of the highway (Tr. 181). The area between the store and the highway is vacant; a semicircular driveway, with both exits on Route 21, is utilized by automobiles to gain access to the store and to a group of other business houses adjacent to and south of the store (Tr. 178, 181-183, 185-186). The vacant area is used for parking (Tr. 178, 182).

There is no sidewalk either paralleling the highway or in front of the entrance to the store (Tr. 308-310, 383). Fairlawn's property rights extend "out to the road" (Tr. 179).

Fairlawn leases approximately 285 feet of property along West Avenue, on which the Tallmadge store is located (Tr. 214, 225-226). That store, like the Richfield store, is "in the country" (Tr. 163, 224). The location of the store with reference to the highway, the customer driveways leading to and from the store to the highway, the parking area in front of the store and the absence of sidewalks are similar to the situation at Richfield (Tr. 163-164, 231, 308, 381). The lessee's property rights at Tallmadge extend to the center of the road (Tr. 231). Those few pedestrians who have occasion to traverse the property walk "just off the pavement" of the street on Fairlawn's leased property (Tr. 232).

Fairlawn's Market Street store is located in one portion of a building which houses the Sparkle Supermarket (Tr. 213, 229). Fairlawn owns no interest in the building itself or in the adjacent property (Tr. 213). At this store also, only a parking area separates the store building from the street (Tr. 230). There is very little pedestrian traffic (Tr. 230).

At all three locations, the pickets walked in front of the store, paralleling the street or highway, at a distance variously estimated at from three to twenty feet from the curb line (Tr. 175, 178, 185-186, 208, 225, 226, 380, 384, 385, 483).[6] Pollock testified that it was his "belief and understanding" that the pickets were walking "on a strip of ground that the public had access to" (Tr. 413). Fair-

6. The pickets frequently walked in the paved area—the driveways (Tr. 164-165). The evidence shows, however, that at no time did the pickets obstruct ingress or egress to the stores (Tr. 168), and there is no contrary finding (*Cf.* pp. 35-36, *infra*).

lawn objected to the use by the pickets, employees and non-employees alike (Tr. 381, 402, 405, 406, 413), of its property at Richfield and Tallmadge for the purpose of picketing (pp. 43, 46, *infra*, Tr. 91; 225, 227, 240).

4. The Secondary Boycott Issue.

Ekers testified that after the picketing began he was followed by Union representatives to the Gibbs and Peerless plants when he went to purchase meat there, and that representatives of these companies refused to sell meat to him (Tr. 220, 221-222, 275, 301-302, 306-307). Evidence was also adduced that representatives of another local union affiliated with the Amalgamated Meat Cutters and Butcher Workmen of North America, the bargaining agent for Gibbs and Peerless employees, induced the Gibbs and Peerless managements to stop selling meat to Fairlawn because of its involvment in the labor dispute with petitioner (Tr. 171-172, 269, 271, 273, 302).[7]

C. Opinions of the Courts Below.

The Court of Common Pleas held that because, as the evidence showed and petitioners conceded, the volume of Fairlawn's interstate imports was insufficient to satisfy the jurisdictional policy standards promulgated by the National Labor Relations Board on July 15, 1954, as the criteria for assertion of its own jurisdiction over retail stores,[8] "if the Board originally had jurisdiction, it has

7. The Court of Appeals recited in its opinion that "in one • • • instance, when [Ekers] was at the place where he bought meat for resale, the air was let out of his tires" (p. 39, *infra*, Tr. 84). There is not a scintilla of evidence in this record, however, which connects the defendant union or any of its agents with this incident, and the court seems to have placed no reliance upon it (Tr. 272).

8. As correctly stated in the opinion (pp. 28-29, *infra*), the Board's current standards for assertion of jurisdiction over retail stores requires annual direct out of state imports of $1,000,000, or

ceded that to the state court" (pp. 28-29, *infra*, Tr. 103). On the merits, the court found the picketing was entirely peaceful (pp. 34-35, *infra*, Tr. 109), but that the object of the picketing was illegal because its purpose was to compel Fairlawn to enter into a union shop agreement at a time when the Union did not represent a majority of Fairlawn's employees (pp. 30, 33-34, *infra*, Tr. 104, 108-109). The court concluded that since its object was unlawful, the picketing did not arise out of a "labor dispute", and that "the banners, which recited: 'On strike,' did not state the truth." (p. 34, *infra*, Tr. 108.) The court also stated that there was "evidence of probative value to sustain a charge of secondary boycott" (p. 35, *infra*, Tr. 108-109). This evidence, said the court tended to support the allegation of unlawful objective (*Ibid*). The court entered a permanent injunction prohibiting the defendants from: (1) picketing the stores and places of business of the plaintiff; (2) trespassing on plaintiff's property, and (3) attempting to persuade any of plaintiff's suppliers to refuse to sell and deliver merchandise to the plaintiff (pp. 36-37, *infra*, Tr. 98-99).

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indirect imports of $2,000,000. Press release No. 445, "NLRB Announces Changes in Standards for its Exercise of Jurisdiction," July 1, 1954; Press release No. 449, *ibid*, July 15, 1954; *Hogue & Knoft Supermarkets*, 110 NLRB 543. Since Fairlawn's annual gross purchases did not exceed $900,000, it is clear, and petitioners throughout conceded, that the Board would not, under these standards have asserted jurisdiction over a charge alleging that by its picketing at Fairlawn's premises the Union was engaging in an unfair labor practice. As for the alleged "secondary boycott" involving the Union's activities with respect to the Gibbs and Peerless packing companies, however, it is by no means clear that the Board would not have entertained a charge by Fairlawn. *Cf. Local Union 25 v. New York, New Haven & H. R. Co.*, No. 33 this Term, 76 S. Ct. 227; *NLRB* v. *Associated Musicians*, 226 F. 2d 900, 907 (C. A. 2).

9. In finding that the Union did not represent a majority, the court disregarded the evidence tending to show interference by Fairlawn, *supra*, p. 6-7 and relied upon the fact that forty-one of the employees had signed the petition which had been drafted and presented to the employees for signature by Fairlawn's supervisory personnel (p. 30, *infra*, Tr. 104).

On appeal, the Court of Appeals considered *de novo* questions of both law and fact (pp. 38, 40, *infra*, Tr. 82, 84). It acknowledged petitioners' challenge to the jurisdiction of state courts to enjoin the exercise of "its right to picket the places of business of Fairlawn Meats" (p. 40, *infra*, Tr. 84). The court held, however, that Fairlawn's business did not "affect interstate commerce" within the meaning of the National Act because its business "is purely of a local character"; the volume of its business "is not large"; it "does not sell any of its products outside of the state of Ohio"; and its "purchases from out of this state, both direct and indirect, do not constitute a large portion of the products it offers for sale to the meat consuming public in Akron and Summit County" (p. 41, *infra*, Tr. 86). The court concluded that "there is no burden placed upon, or obstruction of, interstate commerce by any action taken by the parties to this case" (*Ibid.*) In view of this conclusion, the court stated that it found it unnecessary to discuss the Board's "jurisdictional yardsticks * * * to determine whether the National Labor Relations Board will assume jurisdiction" (pp. 40-41, Tr. 85-86).

On the merits, the court held that the object of the picketing was "forcing the great majority of employees to join the Union" (p. 43, *infra*, Tr. 88). Pursuit of this object by picketing, the court held, is prohibited alike by the National Act and the law of Ohio (pp. 44-46, Tr. 88-91). The court found that the picketing "was part of a plan to avoid an election by the Board" (p. 45, *infra*, Tr. 89-90). The court said (p. 46, *infra*, Tr. 91):

> Where, then, as in this case, no election has been held under the federal regulations, and it is shown that many more than a bare majority have indicated a desire not to organize and join the Union, it would be an 'unfair labor practice' to compel Fairlawn Meats to compel its employees to join a union contrary to their already expressed wishes.

The court concluded that (p. 46, *infra*, Tr. 91-92):

> * * * since the picketing herein was for organizational purposes only, and not to secure a settlement of grievances among the employees, and since the picketing in part was done on land owned by or under lease to Fairlawn Meats, and since the Union by threats and coercion instituted a secondary boycott against Fairlawn Meats, the picketing, although not accompanied by violence, was nevertheless unlawful under the announced policy in Ohio.

The court entered a permanent injunction against defendants in the same terms as the injunction which had been entered by the trial court (pp. 46, 47-48, *infra*, Tr. 92, 78-79).

While refusing to set aside the injunction, the Supreme Court of Ohio did not disclose the reasons which led it to conclude that the constitutional questions raised by petitioners were not "debatable". We must assume, therefore, that it may have adopted the reasoning of either or both courts below.

SPECIFICATION OF ERRORS TO BE URGED.

The court below erred:

1. In holding that Fairlawn's business does not affect interstate commerce within the meaning of the National Labor Relations Act.

2. In holding that the National Board, by promulgating jurisdictional policy standards, ceded to state courts its jurisdiction over alleged unfair labor practices involving enterprises which do not satisfy those standards.

3. In failing to hold that Section 10(a) of the National Act precludes assertion of jurisdiction by the states to apply to conduct which is subject to regulation under the National Act policies which parallel or conflict with those of the National Act.

4. In applying to the union conduct in issue state policies which conflict with the substantive policies of the National Act.[10]

5. In holding that a state may enjoin peaceful picketing in front of the entrance to a retail store involved in a labor dispute on the ground that the employer involved owns the property on which the picketing must proceed and does not consent to its use for that purpose.

6. In failing to hold that under the circumstances of this case the right of the Union to picket in front of the stores, despite the property owner's disapproval, is guaranteed by the National Labor Relations Act and the Fourteenth Amendment.

7. In failing to set aside and to vacate the permanent injunction.

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10. If certiorari is granted we shall demonstrate that while the courts below invoked principles of law identical in part with those of the National Act, the interpretation and application given to those principles was inconsistent with their interpretation and application by the National Board and the federal courts.

REASONS FOR GRANTING THE WRIT.

The critical question on which this case turns is whether, in the absence of a cession agreement entered into between the National Board and a state agency pursuant to Section 10(a) of the National Act, a state may apply to an enterprise which is subject to the National Act, but over which the Board would decline for policy reasons to assert jurisdiction, a state policy which parallels, duplicates or conflicts with the substantive policies of the National Act. Stated otherwise, the question is whether the Board's declination to assert its jurisdiction cedes the Board's jurisdiction to the states.[11]

1. Unlike the trial court, the court of appeals below avoided passing on this question by applying to a threshold inquiry—does the enterprise involved affect interstate commerce within the meaning of the National Act so as to bring it within the Board's jurisdiction—criteria diametrically opposite to those established by this Court.

This Court holds that the National Act covers "local" enterprises which regularly import from other states a quantity of merchandise or supplies greater than that to which courts apply the "maxim *de minimis non curat lex.*" *National Labor Relations Board* v. *Denver Bldg. & Construction Trades Council*, 341 U. S. 675, 683-685; *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601, 606, 607; *Amalgamated Association* v. *Wisconsin Board*, 340 U. S. 383, 391. Under this rule, "local" businesses which import merchandise from other states of far less value than the more than $100,000 worth of goods which Fairlawn

11. Ohio decisions make it clear that but for its holding that the employer in this case was not subject to the National Act, either as a constitutional matter or because of the Board's declination to assert jurisdiction, the court below would have set aside the injunction on constitutional grounds. *Grimes & Hauer, Inc.* v. *Pollock*, 163 O. S. 372, 127 N. E. 2d 203, cert. denied, 350 U. S. 900.

annually imports directly, and the approximately $200,000 worth of goods which it imports indirectly, pp. 8-9, *supra*, are subject to the Act.[12]

The suggestion of the court of appeals (p. 41, *infra*, Tr. 85-86) that the Board's "jurisdictional yardstick * * * may be helpful" in determining whether a particular enterprise is subject to the National Act misconceives the nature and purpose of the yardsticks. The yardsticks apply only to enterprises which are, as a matter of law, subject to the Board's jurisdiction, but over whom for "budgetary or other reasons best known to the NLRB", the Board declines to assert its jurisdiction. *Retail Clerks Local No. 1564* v. *Your Food Stores*, 225 F. 2d 659, 662 (C. A. 10); *National Labor Relations Board* v. *Denver Bldg. & Con-*

12. See, *e.g.*, *National Labor Relations Board* v. *Denver Bldg. & Construction Trades Council*, 341 U. S. 675, 684 (annual purchases by local electric work contractor of over $55,000 from out of state held "not negligible"); *National Labor Relations Board* v. *Stoller*, 207 F. 2d 305, 306-307, cert. den., 347 U. S. 919 (C. A. 9) (annual out of state purchases of approximately $12,000 held to bring local laundry and dry cleaning establishment within reach of the Act); *National Labor Relations Board* v. *Daboll*, 216 F. 2d 143, 144 (C. A. 9), cert. den., 348 U. S. 917 (imports of approximately $77,000 annually held sufficient to subject local plastering contractor to Board's jurisdiction); *National Labor Relations Board* v. *Seven Up Bottling Co.*, 196 F. 2d 424, 426 (C. A. 5), aff'd *sub silentio*, 344 U. S. 344 (imports valued at more than $82,000 held adequate to subject local soft drink bottler to federal jurisdiction); *National Labor Relations Board* v. *El Dorado Water Co.*, 195 F. 2d 950, 953-955 (import of supplies valued at $65,000 for use in maintaining facilities held to subject local water company to National Act).

The fact, upon which the court of appeals relied, p. 13, *supra*, that Fairlawn's direct out of state imports amount to only 15 percent of its total purchases, is irrelevant under the applicable standards. The Act "cannot be applied by a mere reference to percentages", *Santa Cruz Packing Co.* v. *National Labor Relations Board*, 303 U. S. 453, 467; see also, *National Labor Relations Board* v. *Cowell Portland Cement Co.*, 108 F. 2d 198, 201 (C. A. 9) (interstate business only 10 percent of gross business); *J. L. Brandeis & Sons* v. *National Labor Relations Board*, 142 F. 2d 977, 979-980 (C. A. 8), cert. den., 323 U. S. 751 (interstate sales only .0024 percent of total).

struction Trades Council, 341 U. S. 675, 684; *Federal Dairy Co.*, 91 NLRB 638, 639. The Board's "self-imposed rule is not jurisdictional." *National Labor Relations Board* v. *Daboll*, 216 F. 2d 143, 144 (C. A. 9); *Wisconsin Board* v. *Teamsters Union*, 267 Wis. 356, 365; 66 N. W. 2d 318, 323.

If, as the Court of Appeals for the Tenth Circuit held in *Retail Clerks Local No. 1564* v. *Your Food Stores*, 225 F. 2d 659, 663, Congress precluded the states from asserting jurisdiction over any enterprise subject to the National Act in the absence of a cession agreement made pursuant to Section 10(a), it is manifestly essential to the effectuation of that limitation, and to all enterprises affected by it, that the states not be permitted to evade it by determining initially, through the application of erroneous and improper standards, that particular enterprises are not subject to the National Act.

2. The holding of the court of common pleas below that the effect of the Board's adoption of jurisdictional policy standards is to cede to state courts the Board's jurisdiction to remedy unfair labor practices is in square conflict with the decision of the Tenth Circuit in the *Your Food Stores* case.[13] The Court of Appeals of Kentucky has followed the Tenth Circuit's holding[14] and concurrence with the Tenth

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13. In that case, as in this one, although the employer had at no time filed charges with the Board against the union conduct which he asked the state court to enjoin, it was apparent and conceded that under the jurisdictional policy standards then in effect the Board would not assert its jurisdiction and that it would therefore have been "futile" for the employer to do so. See *Bldg. Trades Council* v. *Kinard Construction Co.*, 346 U. S. 933.

14. *Food Basket, Inc.* v. *Amalgamated Meat Cutters and Butcher Workmen of North America*, decided October 21, 1955, not officially reported, but reported unofficially in 29 C. C. H. Labor Cases ¶ 69, 561, pp. 90, 158, 90, 159 n. 1. Accord: *Universal Car Co.* v. *Ass'n. of Machinists* (Cir. Ct. Kent County, Mich.) reported

Circuit's view has been expressed by the Supreme Court of Missouri.[15]

On the other hand, the highest courts of California and Texas have held, in accord with the decision below, that wherever it is clear that the Board would refuse to assert its own jurisdiction, the states are free to apply the policies of the National Act to the dispute.[16]

The Tenth Circuit's holding appears to accord with the views expressed by this Court as to the purpose and effect of Congress' addition of the proviso to Section 10(a) (p. 4, *supra*).[17] In *Algoma Plywood Co.* v. *Wisconsin Board*, 336 U. S. 301, 313, the Court stated that the purpose of this proviso was:

> to meet situations made possible by *Bethlehem Steel Co.* v. *New York S. L. R. B.*, 330 U. S. 767, where no State agency would be free to take jurisdiction of cases over which the National Board had declined jurisdiction. See H. R. Rep. No. 245, 80th Cong., 1st Sess. 40; S. Rep. No. 105, Minority Views, Part 2, 80th Cong. 1st Sess. 38.

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unofficially at 35 LRRM 2087; *New York State Board* v. *Wags Transportation System*, 139 N. Y. S. 2d 731, aff'd on other grounds, 84 App. Div. 883, 134 N. Y. S. 2d 603.

15. *Graybar Electric Company, Inc.* v. *Automotive, Petroleum & Allied Industries Employees Union*, No. 44, 192, September Session, 1955, decided February 13, 1956 (en banc), 37 LRRM 2556.

16. *Garmon* v. *Bldg. Trades Council*, .. Cal. 2d .., 291 P. 2d 1; *Cain, Brogden & Cain* v. *Teamsters Local 47*, ... Tex. ....., 285 S. W. 2d 942. Accord: *School District* v. *Trades Council* (Cir. Ct. Ottowa County, Mich.), reported unofficially 37 LRRM 2232; *Cf. Building Trades* v. *Bonito*, .. Nev. .., 280 P. 2d 295; see *Busch & Sons* v. *Retail Union*, 15 N. J. 226, 233-234, 237, 104 A. 2d 448.

17. Elimination of the word "exclusive" from the proviso as amended, was, of course, neither designed nor intended to affect any extension of state power in the field over which Congress gave jurisdiction to the Board. See Brief for the National Labor Relations Board as *Amicus Curiae* in *Montgomery Bldg. & Construction Trades Council* v. *Ledbetter Erection Co., Inc.*, No. 43, October term, 1952, pp. 30-37; *Amazon Cotton Mill Co.* v. *Textile Workers Union*, 167 F. 2d. 183 (C. A. 4).

In *Amalgamated Association* v. *Wisconsin Board*, 340 U. S. 383, 397, n. 23, this Court said:

> A proviso of § 10 (a) authorizes cession of jurisdiction to the states only where the state law is consistent with the federal legislation. This insures that the national labor policy will not be thwarted even in the predominantly local enterprises to which the proviso applies. S. Rep. No. 105, 80th Cong., 1st Sess. 26 (1947). See also minority views to same report, *id.*, pt. 2, 38, agreeing as to this feature of the legislation.

Under the Wagner Act the National Board took the position that, as a practical matter, states should be permitted to apply their own laws and policies to labor disputes over which, for policy reasons, the Board declined to assert its jurisdiction. Brief for the United States as *Amicus Curiae* in *Bethlehem Steel Company* v. *New York State Labor Relations Board*, Nos. 55, 76, October Term, 1946, pp. 66-70. After the addition of the proviso to Section 10(a), however, the Board has consistently recognized that states may acquire jurisdiction in these areas only pursuant to a cession agreement between the National Board and a state agency.[18] Because, in the Board's view, no state has brought

18. *Punch Press Repair Corp.*, 89 NLRB 614, 615 (1950): (the Board: "lacks power under the present statute to divest itself of jurisdiction, except in conformity with Section 10 (a) of the amended Act"); *Breeding Transfer Co.*, 110 NLRB 493, 497 ("a desire to establish broader State jurisdiction is in no wise a factor in our decision" to raise the dollar volume requirements of the Board's jurisdictional policy standards); Memorandum for the National Labor Relations Board as *Amicus Curiae* in *Gilson Bros.* v. *Wisconsin Employment Relations Board*, No. 383, October Term, 1949, pp. 8-9: ("In authorizing the Board under certain circumstances to cede its jurisdiction to state agencies Congress made manifest its intention that, absent cession, the states were not to exercise jurisdiction as to matters covered by the National Act involving employers and employees who are subject to the National Act."). See also Brief for the National Labor Relations Board as *Amicus Curiae* in *United Automobile Workers* v. *Wisconsin Employment Relations Board*, Nos. 14 and 15, October Term, 1948, pp. 44-45; Brief for the National Labor Relations Board as *Amicus Curiae* in *Montgomery Building & Construction Trades Council* v. *Ledbetter Erection Co.*, No. 43, October Term, 1952, pp. 35-36.

its laws and policies into full conformity with the federal scheme, the Board has deemed itself precluded from making any such cession agreements.[19]

In 1948, the Joint Committee on Labor Management Relations which had been appointed pursuant to Title IV of the 1947 Act, commented on the desirability of permitting states which had not enacted statutes "modeled after the [National] Act", to regulate labor disputes in local enterprises over which the Board declines to assert jurisdiction. S. Rep. No. 986, 80th Cong., Second Sess., Part I, pp. 30-31. The Committee concluded that amendment of the Act would be necessary to enable the states to act in this area, and that, if such an amendment "would permit inconsistent regulations and as many different policies as there are states having labor relations acts, the desirability appears questionable." Subsequently, bills were introduced in Congress to permit the states, without regard to Section 10(a), to exercise jurisdiction where the National Board declines to act.[20] None has been enacted.

Nevertheless, this Court has twice in recent years expressly reserved the question whether, and under what circumstances, declination of jurisdiction by the Board for policy reasons leaves the states free to act. *Garner* v. *Teamsters Union*, 346 U. S. 485, 488; *Building Trades Council* v. *Kinard Construction Co.*, 346 U. S. 933. The volume of litigation and divergence of views which have developed on this issue, and its importance to thousands of employers and employees and to the many labor organi-

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19. *Thirteenth Annual Report*, National Labor Relations Board (Govt. Print. Off., 1949), p. 18.

20. S. 1264, 83rd Cong., 1st Sess., 99 Cong. Rec. 1845-1848 (1953); S. 2218, 83rd Cong. 1st Sess., 99 Cong. Rec. 7283-7284 (1953); S. 2650, 83rd Cong. 2d Sess.; 100 Cong. Rec. 91, 100 Cong. Rec. 5194, 5824, S. Rep. No. 1211, 83rd Cong. 2nd Sess. (1954).

zations affected by the Board's shifting policy standards,[21] merits its early resolution by this Court in the public interest.

3. The findings that the Union was guilty of trespass by picketing on property owned by or under lease to Fairlawn at the West Richfield and Tallmadge stores (pp. 9-11, 12, 14, *supra*), may have been regarded by the courts below as a ground independent of the objective for enjoining picketing at those two locations. That ground, however, could not sustain the injunction against picketing at the Market Street store, since Fairlawn specifically disclaimed any contention that the pickets at that store were guilty of trespass (Tr. 213, 230, *cf.* pp. 43, 46).

Viewed as an independent ground for assertion of jurisdiction by a state court to enjoin picketing under the circumstances prevailing at the West Richfield and Tallmadge stores, that provision of the decree based upon the trespass finding poses an issue of major significance in the effectuation of rights guaranteed to employees and labor organizations against state infringement by Sections 7 and 13 of the National Act, and by the freedom of speech guarantee of the Fourteenth Amendment.[22]

The geographic pattern of the retail stores involved here is characteristic of the great majority of urban and

21. See, Daykin, *NLRB Jurisdictional Standards II*, 6 Labor Law Journal 696, 708-709 (October, 1955); Turnbull, *Federal-State Jurisdictional Problems*, 7 Labor Law Journal 5 (January, 1956); Whitney, *NLRB Jurisdictional Policies and the Federal-State Relationship*, 6 Labor Law Journal 3, 76-80 (January, 1955); Feldblum, *Jurisdictional "Tidelands" in Labor Relations*, 3 Labor Law Journal 114, 115.

22. *Thomas* v. *Collins*, 323 U. S. 516, 533-534; *Hill* v. *Florida*, 325 U. S. 538; *International Union* v. *O'Brien*, 339 U. S. 454; *Amalgamated Association* v. *Wisconsin Board*, 340 U. S. 383; *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468; *Schneider* v. *State*, 308 U. S. 147, 162-165; *cf. Marsh* v. *Alabama*, 326 U. S. 501; *Hague* v. *CIO*, 307 U. S. 496.

suburban shopping centers which have been developed recently. The stores in these centers, typically, are set back from the road or highway, are reached by driveways leading directly from the road to the stores, and rarely have public sidewalks parallel to the roadway.[23] To picket a store so located, in the course of a labor dispute, the pickets, thus, must traverse "private" property, land often owned by or under lease to the employer involved in the dispute.

To hold, as did the courts below, that the employer's ownership of such property, which is maintained for and freely used by his customers, entitles him to preclude peaceful picketing at the store entrance would thus foreclose all peaceful picketing in a large segment of the retail industry of the nation. Cf. *Retail Clerks Local 1564* v. *Your Food Stores*, 225 F. 2d 659, 662 and note 8; *ibid*, 124 F. Supp. 697, 701-702 (D. N. M.); *ibid*; 121 F. Supp. 33 (D. N. M.). The right to publicize a labor dispute by peaceful picketing at the entrance to the establishment involved is guaranteed against state infringement by Sections 7 and 13 of the National Act and by the Fourteenth Amendment.[24] Whether, under these circumstances, the naked property right of the employer supersedes the statutory and constitutional right of his employees peacefully

23. *Allied Plans Biggest Network of Suburban Shopping Centers*, Business Week, January 15, 1955, p. 62; *Cutraters Move to Suburbs*, Business Week, January 22, 1955, p. 47; *Downtown Needs a Lesson From the Suburbs*, Business Week, October 22, 1955, pp. 64-65, 68; *Builder Owner of Largest Shopping Center*, Fortune, May, 1954, p. 44; *How to Expand Shopping Center Zones*, The American City, January, 1956, pp. 116-117.

24. *International Rice Milling Co. v. National Labor Relations Board*, 341 U. S. 665, 672-673; *National Labor Relations Board* v. *Denver Bldg. Trades Council*, 341 U. S. 675, 687; *Schneider* v. *State*, 308 U. S. 147, 162-165; *Wisconsin Board* v. *Teamsters' Union*, 267 Wisc. 356, 66 N. W. 2d 318; cf., *Marshall Field & Co.* v. *National Labor Relations Board*, 200 F. 2d 375, 382 (C. A. 7); *Columbia Southern Chemical Corp.*, 110 NLRB 206, 208.

to picket is a question of public importance which this Court should resolve.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the foregoing petition for certiorari should be granted.

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Counsel for Petitioners.

APPENDIX A.

The relevant provisions of the National Labor Relations Act, as amended, 61 Stat. 136, 29 U. S. C. 151 *et seq.*, are as follows:

Sec. 2. When used in this Act— * * *

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an

agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Sec. 8. (a) It shall be an unfair labor practice for an employer—

1. To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(b) It shall be an unfair labor practice for a labor organization or its agents—

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

Sec. 14. (a) * * * no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

APPENDIX B.

Opinion of the Court of Common Pleas.

(Caption Omitted.)

FINDING.

EMMONS, *J.*

In the first instance, it appearing to the court that there was a misnomer of the Union defendant wherein it was referred to as Local Union No. 427, Amalgamated Meat Cutters Union, Affiliated with the American Federation of Labor, and that the true style of the said Union is the Amalgamated Meat Cutters and Butcher Workmen of North America, Local No. 427, A. F. of L., the court is permitting the change of name to be made to conform to the proof by interlineation without reverification.

This cause came on to be heard upon the issues raised by the pleadings, and upon trial duly had the court is of the opinion that there are but two questions involved:

First: Does the Common Pleas Court have jurisdiction in this case?

Second: Did the evidence prove a situation existing such as made picketing and other acts of the defendants illegal to the extent that a permanent injunction should issue?

It goes without saying that if the first question is to be determined in the negative, then the second question need not be answered.

The defendants make much ado over the fact that the plaintiff company made purchases of meat, dressed

and processed, which originally came into the state by interstate commerce, and since such was the fact then the National Labor Relations Board acquired exclusive jurisdiction in this case.

Albert Satin, Inc., vs. Local 445 Electrical Workers, 22 L. W. 2606. In this case it was held that while it is apparent from a reading of the pertinent decisions and provisions of the Federal Act that Congress did give the Board exclusive jurisdiction over unfair labor practices affecting interstate commerce, it also gave the Board power to cede its jurisdiction to state courts.

Garner vs. Teamsters, 74 Sup. Ct. 161. Here the court determined that neither the NLRB nor the Labor Management Relations Act were involved except in cases in which the controversy "affects interstate commerce."

The cases following this particular line of reasoning continued to add to the phrase "affecting interstate commerce" and making it read: "substantially affecting and interfering with interstate commerce."

Later on the NLRB in the following cases expressed what was known as "the volume of business test." 91 NLRB 638; 88 NLRB 226; 87 NLRB 248.

Finally the Board has set down greater measures and newer standards for "the volume of business test," which standards became effective July 15, 1954, and are set out in 14014 C. C. H. [*sic*]

"For retail stores:

1. A single independent retail store or chain of stores operating entirely within one state will not come under the Board's jurisdiction unless the store involved in the case has:

(a) Purchases amounting to at least $1,000,000.00 a year coming to it directly from outside the state;

(b) Purchases of $2,000,000.00 a year coming to it indirectly from outside the state."

(The former standards for stores were $500,000.00 a year for direct purchases from outside the state and $1,000,000.00 a year from indirect purchases outside the state.)

Since less than 5 per cent of the plaintiff's business was wholesale, that business would well come within the definition of retail stores, and under either standard the business done by the plaintiff company was well under those measures of "volume of business."

Recently the NLRB in the case of *Union vs. Arthur and Ted Shapiro, dba the Packard Company,* dismissed that case in which the Packard Company was charged with unfair labor practices because it involved "small business" and did not come within the limits that the Board set for accepting jurisdiction, the purchases being well under the $1,000,000.00 class.

It is therefore the court's finding that insofar as the first question is concerned that this court does have jurisdiction in this case, since the plaintiff company too is well within the limits set by the Board in their "volume of business test," and that if the Board originally had jurisdiction, it has ceded that to the state court.

Coming to the second question to be here determined, the court finds that a stipulation was signed by B. H. Ekers for the plaintiff, and Dan J. DeSantis, business representative, for the defendant Union, in which the employer (the plaintiff company) agreed that when a contract was concluded it should include a provision establishing a union shop security clause, and also further provided that either party might at their option cancel the stipulation.

Ekers, on behalf of the plaintiff company, would not sign a contract with the defendant Union, and even went so far as to bring this injunctive proceedings against them, so he thereby, constructively at least if not actually, exer-

cised his option to cancel the aforesaid stipulation—so insofar as this case is concerned, this stipulation is of no effect, except to express the intention of the defendants to cause the plaintiff company to establish a union shop.

The contract which the plaintiff company was asked to sign, and which the president refused to do, contained, among other terms, the following:

> "All employees covered by this agreement shall within thirty days after the execution of this agreement, or thirty days after their employment, whichever is later, during the term of this agreement, become members of the Union and remain members of the Union in good standing during the life of this agreement. The employer agrees to notify the Union of any new help."

Evidence was presented which proved the fact to be that no employees were exempted from the coverage and the terms of the contract, so that if and when the contract was signed it would be a compelling force for all the employees of the plaintiff to become members of the said Union, whether they wanted to or not or they could no longer be employed by the plaintiff company. And of the 50 employees of this company 41 of them on February 10th, 1954, signed the following statement:

> "We, the undersigned, employees of the Fairlawn Meats, Inc., hereby certify that there is no dispute or disagreement between us and our employer, the Fairlawn Meats, Inc., as to hours of work, rate of pay, or any conditions affecting our employment, and we are not on a strike against our employer, and we are not in favor of our employer signing any agreement that will force or compel us to join any union."

There have been numerous cases decided, locally and nationally, which heretofore gave the unions the right to peacefully picket and banner an employer under the con-

stitutional right of freedom of speech, even though there was no labor dispute. Some of these cases are as follows: *A. F. of L. vs. Swing*, 312 U. S. 321; *Milk Wagon Drivers etc., vs. Meadowmoor Dairies, Inc.*, 312 U. S. 287; *Iacomini's Restaurant, Inc., vs. Hotel Employees and Bar Tenders Local 118 et al.*, 63 Ohio Law Abstract 258. However there has been a recent definite trend that shows a change of thought, as pointed out in *W. E. Anderson Sons Company vs. Local Union 311*, 156 O. S. 541:

> "Suddenly the view of the Supreme Court seemed to change to a recognition of rights in certain instances which warranted an injunction against picketing or bannering notwithstanding the constitutional protection of free speech."

After making the above statement Justice Hart, speaking for the Supreme Court of Ohio, then cited three cases decided by the Supreme Court of the United States: *Building Service Employees International Union Local 262 vs. Gazzam*, 339 U. S. 532; *Hughes vs. Superior Court*, 339 U. S. 460; *International Brotherhood of Teamsters Union Local 309 vs. Hanke*, 339 U. S. 470.

Quoting syllabus 4 in the *Anderson* case, *supra*, 156 O. S. 543:

> "Picketing or bannering as a means of exercising free speech will be afforded constitutional protection as long as it is lawfully conducted, but the right of free speech is predicated on the lawful use of that right, and if through conspiracy or unlawful conduct the result of its exercise by such means unlawfully injures another in his property rights, the guarantee ceases and the exercise of the claimed right by such means may be enjoined or prohibited."

It was stated by Justice Minton in *Union vs. Gazzam*, 339 U. S. 533, cited *supra*:

> "If respondent had complied with petitioner's demands

and had signed one of the tendered contracts and lived up to its terms, he would have thereby coerced his employees. The employees would have had no free choice as to whether they wished to organize or what union would be their representative."

108 O. S. page 95, in *The LaFrance Electrical Construction and Supply Company vs. The International Brotherhood of Electrical Workers Local 8, et al.*, Justice Florence Allen said:

"Equality of justice demands that in any controversy the rights of all parties are scrupulously maintained. The right of the workmen to be employed, irrespective of union membership, must be maintained; the right of the employer to conduct his business without illegal interference must be upheld and legal means employed by strikers must not be curtailed."

Crosby vs. Rath, 136 O. S. 352:

"The right to contract, the right to do business and the right to labor freely and without restraint are all constitutional rights, equally sacred, and the privilege of free speech cannot be used to the exclusion of other constitutional rights, nor as an excuse for unlawful activities in interference with another's business."

Coming now to a decision rendered by our own Ninth District Court of Appeals in 94 Ohio Appeals 361, *Bean vs. Local Union 698 et al.*, we find the syllabus in this case as follows:

"In the absence of a dispute between employer and employees, or between the union and the employer or employees, a labor union may not engage in organizational picketing, even though peaceful, for the purpose of bringing pressure to bear upon the employer to require his employees to join the union."

In his opinion in the *Bean* case Judge Stevens stated:

"The sole question for determination here is this:

May a union, in the absence of a dispute between employer and employees, or between the union and the employer or employees, engage in peaceful picketing for the purpose of bringing pressure to bear upon the employer to require his employees to join the union? In other words, may peaceful picketing for organizational purposes of the union be lawfully conducted? We think the question stated has been completely answered in the negative by the decision in Crosby vs. Rath."

Was there a labor dispute in the instant case?

Miller vs. District 76, 23 Labor Cases 67487:

"Picketing for the purpose of coercing an employer to sign a collective bargaining agreement and compelling his employees to rejoin the union does not present the existence of a labor dispute and will be enjoined."

Wischusen vs. Griffin, 23 Labor Cases, section 67683:

"Not every matter which directly or indirectly affects labor is a labor dispute. There is no labor dispute involved where a union pickets for the unlawful purpose of forcing an employer to sign a contract recognizing the union as exclusive bargaining representative of his employees, without their consent."

Hotel Restaurant [*sic*] *vs. Union*, 23 Labor Cases, section 67485:

"Picketing for the purpose of forcing an employer to recognize as his employees' bargaining representative a union which does not represent a majority of his employees is the use of economic pressure for an illegal purpose and not in support of a bona fide labor dispute."

227 [*sic*] *Ohio Jurisprudence*, page 45:

"Picketing is not beyond the control of the state if the manner in which picketing is conducted, or the purpose which it seeks to effectuate, gives grounds for its disallowance."

I am governed in this case by the previous holdings made by courts superior to this one, and I am duty bound to apply the evidence as I find it to the law in this case, as interpreted by those courts.

Therefore, from all the evidence presented the court is of the definite conclusion that the defendants, Pollock and Dougherty, acting for the defendant Union, attempted to get Ekers, President of Fairlawn Meats, Inc., to sign a contract compelling union membership in the defendant Union within 30 days or be discharged from the employment of the plaintiff company, which fact would have denied the employees their freedom of choice; that there was no labor dispute existing; that the banners, which recited: "On strike," did not state the truth, and that while picketing and bannering were peaceful yet since no labor dispute was involved the picketing and bannering became unlawful and caused a diminution of the plaintiff's business to some 30 per cent.

I believe that it now has been established clearly by the decisions of the courts and the NLRB that injunctions will lie when the picketing and bannering is peaceful but unlawful, as well as where it is not peaceful.

A conspiracy is a combination of two or more persons to accomplish by concert of action some unlawful purpose, so that even though the pickets and defendants believed they were acting lawfully in peaceful picketing and bannering the plaintiff company, yet if it develops that their actions are unlawful then, having acted in concert, they become members of a conspiracy. Since the court is of the opinion that there is no labor dispute existing, then peaceful picketing and bannering done by the members of the defendant Union under the guidance and direction of the defendants was a conspiracy to do an unlawful act.

In this instance the court wishes to state that insofar

as picketing and bannering were concerned it was evident that the members of the defendant Union acted as ladies and gentlemen in all respects. However, even though the court finds no fault in the manner of picketing, yet the purpose for which it was done makes it unlawful so as to entitle the plaintiff to injunctive relief.

Was there a secondary boycott?

A secondary boycott is a combination not merely to refrain from dealing with a person, or to advise or by peaceful means persuade his customers from dealing with him, but to exercise coercive persuasion upon those parties from whom the person buys and to whom he sells which causes the buyers and the sellers to withdraw from business with that person through fear of loss and damage to themselves.

There was evidence of probative value to sustain a charge of secondary boycott, and while those acts were not of such great prominence, yet they successfully lent themselves to proving the charges in the petition.

The court concludes that the allegations of the petition have been proved with sufficient weight as causes this court to find that the prayer of the petition should be sustained ordering a permanent injunction as asked for therein.

Journal entry to be prepared to conform to the court's finding, saving exceptions to these defendants.

APPENDIX C.

Journal Entry of the Court of Common Pleas.

(Caption Omitted.)

(October 13, 1954.)

1. This cause came on to be heard upon the pleadings, the evidence and the arguments and briefs of counsel for the parties, and the issues having been duly tried, and the Court, after due deliberation, having made a finding herein and filed the same in which a decision in favor of the plaintiff and against the defendants is duly made, the Court finds on the issues joined in favor of the plaintiff and against the defendants and that the prayer of plaintiff's petition should be granted.

2. It is, therefore, Ordered and Decreed that the defendants and each of them and the officers and members of the defendant union and all persons acting with the defendants or in concert with the defendants be and they hereby are enjoined and restrained from:

(1) Picketing the stores and places of business of the plaintiff and from congregating, standing or having individuals congregate and stand on the premises where plaintiff's stores are located and from coercing, threatening, intimidating or turning aside against their will those who would go to the plaintiff's stores to sell, purchase or deliver goods, or any of the employees of plaintiff.

(2) Trespassing upon plaintiff's property.

(3) Compelling or inducing, or attempting to compel or induce by threats, intimidation, persuasion, force or violence any of plaintiff's suppliers of merchandise to refuse or fail to sell and deliver merchandise to the plaintiff.

(4) Warning plaintiff's employees, agents or officers, or persons about to become such, that they will suffer or be likely to suffer any of the wrongs or injuries enjoined in this order, if they enter plaintiff's employment or continue therein.

(5) Aiding or advising any person to permit any of said wrongs or injuries.

The defendants shall pay the costs herein, for which sum judgment is awarded to plaintiff. Exceptions to the defendants to the finding and order are granted. Bond for appeal One Hundred Dollars ($100.00).

APPENDIX D.

Opinion of the Court of Appeals.

(Caption Omitted.)

Argued March 1, 1955.

Decided May 18, 1955.

APPEAL ON QUESTIONS OF LAW AND FACT.

HUNSICKER, *J.*

This is an appeal on questions of law and fact.

In this opinion, the appellee (plaintiff below) shall be designated as Fairlawn Meats, and the appellants (defendants below) shall be designated as the Union. The cause in this court, by agreement of the parties, was heard on the transcript of testimony taken in the trial court, together with the exhibits there introduced.

Fairlawn Meats operates three stores for the sale of meats and related products, to both wholesale and retail customers. Approximately 50 persons are employed, a minority of whom were members of the Union at the time of or during the occurrences which led to the controversy herein.

The Union, through its responsible offcers in this area, sought to organize the employees of Fairlawn Meats, but were unable to secure more than 18 members, although, at the time of the strike herein, there were less than 10 who actively interested themselves in the conduct of the strike.

After efforts to organize the employees failed, the management was approached with a request that it rec-

ognize the Union as sole bargaining agent of the employees, that they sign a contract that would require that all of their employees join the Union within 30 days, or, if they refused to do so, they would be discharged. Other provisions of the standard contract were proposed to the management, which, after many discussions, refused to enter into a contract with the Union. The evidence discloses that there was no discrimination in the employment or discharge of members of the Union, and that they could join or not join, so far as management was concerned.

The Union, when Fairlawn Meats refused to sign the contract, then bannered each place of business. Most of the employees who were members of the Union remained away from their jobs, although a few who first left their employment returned to work, and a few signed a statement of resignation from Fairlawn Meats.

At two of the stores, picketing was done by using land owned by, or under lease to, Fairlawn Meats; and, although the Union officials were notified of this fact, picketing continued over such lands.

The evidence also showed that Mr. Ekers, the manager and principal owner of Fairlawn Meats, was followed by Union officials when he went to some of the places where he purchased meat, and that, on one such instance, while at the place where he bought meat for resale, the air was let out of the tires of his automobile.

There is competent, credible evidence to show that, in order to enforce the demands of the union that Fairlawn Meats sign the standard contract requiring Fairlawn Meats to force the employees to join the Union or be discharged, at least two of the companies from whom meats were purchased for resale were threatened with imminent labor difficulties within their plants. As a result of these threats,

such companies refused to sell any meat products to Fairlawn Meats.

Fairlawn Meats filed an action in the Court of Common Pleas, asking for both a temporary and a permanent injunction. The Union denied that the state trial court had jurisdiction to entertain the action, and, without waiving its objection to jurisdiction, said that it was engaged in a bona fide labor dispute, denied that it engaged in any unfair labor practice, and asserted its right to picket the places of business of Fairlawn Meats. The cause is heard in this court de novo on the same pleadings filed in the trial court.

The first question that confronts this court is that concerning the jurisdiction of the state court to proceed in a determination of the issues herein.

The Congress of the United States, by the enactment of the National Labor Relations Act, intended to exercise the full scope of its authority to regulate unfair labor practices affecting interstate commerce. *Universal Car and Service Co. of Grand Rapids* v. *I.A.M. Lodge 1573*, 27 Labor Cases, C. C. H., par. 68,825.

"Affecting commerce" is defined in the Labor Management Relations Act. See Title 29, U. S. C. A., Sec. 152(7).

It is not necessary to discuss "jurisdictional yardsticks," as found in the regulations of the National Labor Relations Board (1 Labor Law Reporter, C. C. H., par. 1610, p. 1614), to determine whether the National Labor Relations Board will assume jurisdiction. It is not necessary to explore what areas in labor controversies are left open to the jurisdiction of the state courts. It is apparent that we have before us in the instant case a question of fact which may be stated as follows: Does the business of Fairlawn Meats, Inc., affect interstate commerce within the terms of the National Labor Managements Act? Or, may be stated: Do the facts herein show that Fairlawn Meats,

Inc., is an "industry affecting commerce" within the terms of the National Labor Managements Act?

Although it is true that the "jurisdictional yardstick" established by the regulations of the National Labor Relations Board may be helpful as evidence to determine the fact, it is not, in the case before us, the controlling feature.

The evidence herein clearly shows that the business of the plaintiff is purely of a local character. It is limited in the main to Akron and the surrounding area. The volume of business is not large for a city and county as populous as Akron and Summit County; it does not sell any of its products outside of the state of Ohio. Its purchases from out of this state, both direct and indirect, do not constitute a large portion of the products it offers for sale to the meat consuming public in Akron and Summit County.

We find, therefore, that there is no burden placed upon, or obstruction of, interstate commerce by any action taken by the parties to this case.

We determine, therefore, that the state courts have jurisdiction to hear the case.

We come now to the second question presented by the facts as shown by the transcript of testimony and the exhibits before us. Should the injunction be granted?

The case which pronounces the policy of the state of Ohio, with respect to organizational picketing, is *Crosby v. Rath*, 136 O. S. 352; and, while it was true that, in that case, there was much evidence of violence which accompanied the picketing, yet the court said, at page 355:

> "* * * The thing upon which the defendants are insisting is that the plaintiff discharge her employees unless they become members of one of the defendant unions. There is no reason or convincing authority sustaining the contention of the defendants that they have the right to engage in picketing or boycotting under such circumstances. That this must be the law

is clearly indicated by the intolerable and unexplainable predicament in which an employer might well find himself if picketed by two or more hostile unions with each one insisting that the employer discharge his employees unless they become members of that particular union alone."

The latest pronouncement by the Supreme Court of Ohio on the subject of the right to picket for organizational purposes is found in the case of *W. E. Anderson Sons Co. v. Local Union No. 311, etc., et al.*, 156 O. S. 541. The syllabi in that case, which establishes the law says:

"1. Where no unlawful purpose or object is involved, workers may by means of picketing or bannering announce their grievances to the public and thus persuade or seek to persuade prospective employees as well as prospective customers of the person against whom the picketing or bannering is directed from dealing with such person.

"2. A boycott may be defined in general terms as a concerted refrainment from business relations with another, or a concerted persuasion of third persons outside the combination to so refrain. It may be primary where there is a concerted refrainment from business relations with another, or by peaceful means a concerted inducement of others outside the combination to so refrain; or it may be secondary where there is not merely a concerted refrainment from business relations with the person against whom the boycott is directed or by peaceful means a concerted inducement of others outside the combination to so refrain, but an exercise of economic pressure upon such others to cause them to refrain from business relations with the person against whom the boycott is directed, through fear of loss or damage to themselves if they refuse to do so.

"3. Where a building trades union which has a labor dispute with one of several subcontractors on a construction job pickets and banners the construction site for the purpose of inducing the craft employees of

the general contractor to quit their employment in concert and thereby bring about a work stoppage on the entire construction job, all for the further purpose of influencing such general contractor to cause the discharge of the subcontractor with whom the union has the labor dispute such picketing and bannering constitute a secondary boycott.

"4. Picketing or bannering as a means of exercising the right of free speech will be afforded constitutional protection so long as it is lawfully conducted, but the right of free speech is predicated on the lawful exercise of such right, and if, through conspiracy or unlawful conduct, the result of its exercise by such means unlawfully injures another in his property rights, the guaranty ceases and the exercise of the claimed right by such means may be enjoined or prohibited.

"5. Picketing or bannering for the purpose of aiding or bringing about a secondary boycott may be enjoined."

This Court of Appeals has had occasion to pass on the right to picket for organizational purposes in the case of *Bean v. Local Union No. 698, et al.*, 94 O. App. 361, wherein we said:

"In the absence of a dispute between employer and employees, or between the union and the employer or employees, a labor union may not engage in organizational picketing, even though peaceful, for the purpose of bringing pressure to bear upon the employer to require his employees to join the union."

In the instant case, the principal object and purpose of bannering the places of business of Fairlawn Meats, Inc., was for the purpose of forcing the great majority of employees to join the Union. The resultant acts of the Union to secure their object, such as coercion of the suppliers of meats, and picketing on property under control of Fairlawn Meats, was the result of the failure of the Union to secure

the organization of the majority of the employees by peaceful means. This failure to convince the employees and the management was then followed by the picketing lines being established.

When we examine the acts of Congress, with respect to national labor relations (U. S. C. A., Title 29, Chapter 7, Section 151, *et seq.*), we find that Sec. 157 of the above act says:

> "Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities, for the purpose of collective bargaining or other mutual aid or protection * * *."

And Sec. 159 says, in part:

> "(a) Representatives designated or selected for the purposes of collective bargaining by the *majority* of the employees * * * shall be the exclusive representatives of all the employees in such unit * * *." (Italics of the court.)

It is thus apparent that, even where jurisdiction does lodge in the National Labor Relations Board, there is an opportunity for the Union to appeal to that board, but, in the instant case without a majority of the employees of Fairlawn Meats, it would be a futile act, and the Union would lose all right to proceed in the manner it did in this case.

Although counsel for the Union insist that the National Labor Relations Board does have jurisdiction, it seems to us that the picketing engaged in herein was part of a plan to avoid an election by such board, and thus deprive the employees by majority vote to select or not to select bargaining representatives.

The declared policy of the United States, through the Labor Management Relations Act, *supra*, is to encourage

the practice and procedure of collective bargaining, and to protect the exercise by employees of full freedom of organization and selection of representatives of their own choosing.

It is the public policy of the State of Ohio, as declared in the cases cited, *supra*, that employers may not be picketed for the purpose of coercing their employees to join a union. The Supreme Court of the United States has indicated its approval of such a state policy as adopted by the legislature of the state of Washington, when it said, in *Building Service Employees International Union, etc., v. Gazzam*, 339 U. S. 532, 70 S. Ct. 784, 94 L. Ed. 1045, as follows:

> "In a state whose public policy is that employers shall not coerce their employees' choice of a bargaining representative, a state court injunction against peaceful picketing by a labor union for the particular purpose of compelling an employer to sign a contract which would coerce his employees' choice of a bargaining representative does not violate the right of free speech guaranteed by the First and Fourteenth Amendments of the Federal Constitution.
>
> "(a) Since picketing is more than speech and establishes a *locus in quo* that has far more potential for inducing action than the message the pickets convey, this Court upholds a state's restraint of acts and conduct which are an abuse of the right to picket rather than a means of peaceful and truthful publicity.
>
> "(b) The picketing of the employer to compel him to coerce his employees' choice of a bargaining representative was unlawful because it was an attempt to induce a transgression of the State's policy against such coercion of employees."

We do not believe that there is a difference in the effectiveness of the policies so adopted, whether by legislative act or by declaration of the highest judicial authority in the state.

It is declared by Section 158 of the National Labor Managements Act to be an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" to employees by Section 157 of the Act (right of employees to organize or refrain from such activity). Where, then, as in this case, no election has been held under the federal regulations, and it is shown that many more than a bare majority have indicated a desire not to organize and join the Union, it would be an "unfair labor practice" to compel Fairlawn Meats to compel its employees to join a union contrary to their already expressed wishes.

It is the judgment of this court that, since the picketing herein was for organizational purposes only, and not to secure a settlement of grievances among the employees, and since the picketing in part was done on land owned by or under lease to Fairlawn Meats, and since the Union by threats and coercion instituted a secondary boycott against Fairlawn Meats, the picketing, although not accompanied by violence, was nevertheless unlawful under the announced policy in Ohio.

The injunction heretofore granted by the trial court shall be continued, and this court will enter the same order with respect to such injunction as was entered by the trial court.

Decree for the appellee, at the costs of appellants.

STEVENS, *P. J.*, and DOYLE, *J.*, concur.

APPENDIX E.

Journal Entry of the Court of Appeals.

Caption Omitted.

(June 4, 1955):

1. This cause came on for hearing in this Court, de novo, on questions of law and fact. By agreement of the parties, the cause was heard on the transcript of testimony taken in the trial court, together with the exhibits there introduced; the briefs and arguments of counsel for the parties, and the issues having been duly tried, and the Court, after due consideration and deliberation, having rendered its opinion in which a decision in favor of the plaintiff-appellee and against the defendants-appellants is duly made, the Court finds on the issues joined in favor of the plaintiff-appellee and against the defendants-appellants and that the prayer of the petition of plaintiff-appellee should be granted.

2. It is, therefore, Ordered and Decreed that the defendants and each of them and the officers, directors and members of the defendant union and all persons acting with the defendants or in concert with the defendants be and they hereby are enjoined and restrained from:

(1) Picketing the stores and places of business of the plaintiff and from congregating, standing or having individuals congregate and stand near the premises where plaintiff's stores are located and from coercing, threatening, intimidating or turning aside against their will those who would go to the plaintiff's store to sell, purchase or deliver goods, or any of the employees of the plaintiff.

(2) Trespassing upon plaintiff's property.

(3) Compelling or inducing, or attempting to compel or induce by threats, intimidation, persuasion, force or violence any of plaintiff's suppliers of merchandise to refuse or fail to sell and deliver merchandise to the plaintiff.

(4) Warning plaintiff's employees, agents or officers, or persons about to become such, or the families of either, that they will suffer or be likely to suffer any of the wrongs or injuries enjoined in this order, if they enter plaintiff's employment or continue therein.

(5) Aiding or advising any person to commit any of said wrongs or injuries.

The defendants-appellants shall pay the costs herein for which sum judgment is awarded plaintiff-appellee. To all of which the defendants-appellants except.

s/ OSCAR HUNSICKER,
Judge.

APPENDIX F.

No. 34542.

SUPREME COURT OF OHIO.

FAIRLAWN MEATS, INC.,

Appellee,

vs.

AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, LOCAL 427, AFL, ET AL.,

Appellants.

Nov. 9, 1955.

Appeal from the Court of Appeals for Summit County.

Per Curiam.

It is ordered and adjudged, *sua sponte*, that this appeal as of right be, and the same hereby is, dismissed for the reason that no debatable constitutional question is involved.

Appeal dismissed.

WEYGANDT, *C. J.*, and MATTHIAS, HART, STEWART and BELL, *JJ.*, concur.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 41

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, LOCAL NO. 427, AFL, ET AL.,

Petitioners,

vs.

FAIRLAWN MEATS, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

BRIEF FOR PETITIONERS.

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INDEX.

	PAGE
Citations to Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	4
A. The Labor Dispute	4
B. Proceedings Below	6
1. The Interstate Commerce Facts	8
2. The Union Majority Issue	9
3. The Trespass Issue	9
4. The Secondary Boycott Issue	11
C. Opinions of the Courts Below	11
Summary of Argument	15
Argument	21
Introduction	21
I. The National Labor Relations Act Applies to the Labor Dispute Which Gave Rise to the Instant Case	23
A. Fairlawn's Operations Affect Interstate Commerce Within the Meaning of the National Act	23
B. The Fluctuating Administrative Practices and Policies of the National Labor Relations Board in Exercising Its Jurisdiction Do Not Determine the Coverage of the National Act	25
C. States May Not Impair the Exercise of Rights Guaranteed by the Act, or Apply Policies Inconsistent With the Policies of the National Act, to Disputes Covered by the Act Over Which the Board Administratively Declines to Assert Jurisdiction	35

II. Ohio Law Governing Labor Disputes, as Applied in This Case, Is Inconsistent With the National Act 42

A. The Courts Below Entirely Overlooked Fairlawn's Unfair Labor Practices Which Federal Law Condemns 42

B. Being the Fruit of Fairlawn's Unfair Labor Practices, the Evidence on Which the Ohio Courts Relied to Establish the Union's Lack of Majority Support Among the Employees Would Not Be Deemed Probative or Even Admissible for That Purpose Under the Policies of the National Act 45

C. Ohio Law Outlaws Peaceful Strikes and Picketing for Organizational and Recognition Purposes Which Federal Law Sanctions 48

D. Ohio's Policy of Permitting Employers to Resort Directly to the Courts for Injunctive Relief Against Peaceful Strikes and Picketing Conflicts With Congress' Determination That Private Parties Should Be Barred From Direct Resort to the Courts for Injunctive Relief in Such Cases 55

III. The Terms and the Legislative History of the Proviso to Section 10(a) Show That the States May Acquire Jurisdiction to Regulate Unfair Labor Practices Over Which the Board Is Vested With Jurisdiction Only by Cession From the Board. In the Absence of a Cession Agreement State Power Remains Precluded Whether or Not the Board Chooses to Assert Its Jurisdiction. 59

IV. Ohio May Not Enjoin Peaceful Picketing in Front of the Entrances to Fairlawn's Stores on the Theory That the Pickets Are Trespassers 83

Conclusion 91

Appendix 93

Labor Management Relations Act, 1947, 61 Stat. 136, 29 U. S. C. 141, et seq.

Section 1(b) 93
Section 2(6) 93
Section 2(7) 94
Section 2(9) 94
Section 7 94
Section 8(a)(1) 94
Section 8(a)(3) 94
Section 8(a)(5) 95
Section 8(b)(1) 95
Section 8(b)(2) 95
Section 8(b)(4) 95
Section 8(c) 96
Section 8(d) 96
Section 8(d)(1) 96
Section 8(d)(2) 96
Section 8(d)(3) 96
Section 8(d)(4) 97
Section 9(f) 97
Section 9(g) 99
Section 9(h) 99
Section 10(b) 99
Section 10(c) 101
Section 13 102
Section 14(a) 102
Section 14(b) 102
Section 203(b) 102
Section 301(a) 103
Section 302(a) 103
Section 302(b) 103
Section 303(a) 103
Section 303(b) 105

AUTHORITIES CITED:

Cases.

Adams Motors, Inc., 80 NLRB 1518 33

Advance Stamping Co. v. Local 267, UAW, 38 LRRM 2382 44

Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board, 336 U. S. 301 ..... 15, 63

Amalgamated Association, etc. v. Wisconsin Employment Relations Board, 340 U. S. 383 ..... 15, 16, 23, 24, 36, 38, 53, 65, 69, 83

Amalgamated Meat Cutters, etc. v. Johnson, 178 Kan. 405, 286 P. 2d 182 53

Amazon Cotton Mill Co. v. Textile Workers Union, 167 F. 2d 183 ..... 58, 71

AFL v. Swing, 312 U. S. 321 86

Anderson v. Retail Clerks' Union, 38 LRRM 2324 ..... 46, 47, 53

Bakery Sales Drivers Local Union v. Wagshal, 333 U. S. 437 78

Barton Brass Works, 78 NLRB 431 25

Bausch & Lomb Optical Co., 107 NLRB 790, Aff'd, 217 F. 2d 575 44

Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U. S. 767 ..... 15, 19, 31, 36, 40, 41, 42, 60, 61, 62, 63, 76

Brandeis & Sons v. NLRB, 142 F. 2d 977, cert. den., 323 U. S. 751 25

Breeding Transfer Company, 110 NLRB 493 ..... 29, 30

California v. Zook, 336 U. S. 725 ..... 16, 66

Capital Service v. NLRB, 204 F. 2d 848 ..... 67, 84

Checker Cab Co., 100 NLRB 683 28

Columbia-Southern Chemical Corp., 110 NLRB 206.. 89
Consolidated Machine Tool Corp., 67 NLRB 737.... 43
Continental Desk Co., 104 NLRB 912..... 43
Denver Building & Construction Trades Council, 90 NLRB 1768 49
Deskins Super Market, 115 NLRB No. 252..... 75
East Newark Realty Corp., 115 NLRB No. 75..... 29
East Texas Motor Freight Lines, 47 NLRB 1023.... 44
Ferro-Co Corp., 102 NLRB 1660..... 54
Food Basket, Inc. v. Amalgamated Meat Cutters & Butcher Workmen of N. A., 29 CCH Labor Cases 69, 561 67
Food Basket No. 2, Inc. v. Local 227, A. M. C. Civil No. 18, 407, Ct. of Appeals of Kentucky..... 91
Gagnon Plating & Mfg. Co., 103 NLRB 263..... 43
Garner v. Teamsters' Union, 346 U. S. 485.....
.....35, 49, 55, 63, 73, 78, 84
Gary Hobart Water Corp., 115 NLRB No. 253..... 75
Graybar Electric Company, Inc. v. Automotive Petroleum & Allied Industrial Employees Union No. 44, ... Mo. ....., 2783 W. 2d 794..... 67
Grimes & Hauer, Inc. v. Pollock, 163 O. S. 372, 127 N. E. 2d 203, cert. den., 350 U. S. 900..... 22
Haleston Drug Stores, Inc. v. NLRB, 187 F. 2d 418 .....26, 32, 67
Hague v. CIO, 307 U. S. 496..... 85
Hill v. Florida, 325 U. S. 538..... 38
Hogue & Knott Supermarkets, 110 NLRB 543..... 11
International Metal Products Co., 104 NLRB 1076.. 48
International Union, etc. v. O'Brien, 339 U. S. 454
.....35, 38, 53

Kaiser-Frazer Parts Corp., 80 NLRB 1050.....33, 71
La Crosse Telephone Corp. v. Wisconsin Employment Relations Board, 336 U. S. 18.....41, 75
Local Union 25 v. New York, New Haven & H. R. Co., 350 U. S. 155 12
Marathon Electric Mfg. Corp., 106 NLRB 1171..... 44
Marsh v. Alabama, 326 U. S. 501..... 86
Marshall Field & Co. v. NLRB, 200 F. 2d 374..... 87
Mastro Plastics Corp. v. NLRB, 350 U. S. 270..... 47
Matthews v. Huwe, 269 U. S. 262..... 2
Medford Building & Construction Trades Council, 96 NLRB 165 .....47, 49
Medo Photo Corp. v. NLRB, 321 U. S. 678..... 45
NLRB v. Associated Musicians, 226 F. 2d 900, cert. den., 351 U. S. 962..... 12
NLRB v. Babcock & Wilson Co., 351 U. S. 105..... 89
NLRB v. Baltimore Transit Co., 140 F. 2d 51, cert. den., 321 U. S. 795..... 30
NLRB v. Cowell Portland Cement Co., 108 F. 2d 198 25
NLRB v. Daboll, 216 F. 2d 143, cert. den., 348 U. S. 917 .....24, 30
National Labor Relations Board v. Denver Bldg. & Construction Trades Council, 341 U. S. 675.....
.....20, 24, 26, 27, 31, 84, 88
NLRB v. Dixie Terminal Co., 210 F. 2d 538, 347 U. S. 1015 .....30, 32
National Labor Relations Board v. Fainblatt, 306 U. S. 601 .....23, 62
NLRB v. Hearst Publications, Inc., 322 U. S. 111.... 90
NLRB v. International Rice Milling Co., 341 U. S. 665 84
NLRB v. Lake Superior Lumber Co., 167 F. 2d 147.. 86

NLRB v. LeTourneau Co. of Georgia, 324 U. S. 793.. 86
NLRB v. Red Rock Co., 187 F. 2d 76.....29, 30
NLRB v. Seven-Up Bottling Co., 196 F. 2d 424, aff'd sub silentio, 344 U. S. 344..... 24
National Labor Relations Board v. Stoller, 207 F. 2d 305 24
National Labor Relations Board v. Stowe Spinning Co., 336 U. S. 226.....20, 86, 87, 90
NLRB v. Suburban Lumber Company, 121 F. 2d 829.. 25
NLRB v. United Biscuit Co., 208 F. 2d 52..... 43
NLRB v. Warren Co., 350 U. S. 107..... 46
National Maritime Union of America, 78 NLRB 971 .....51, 52
New York State Labor Relations Board v. Wags Transportation System, 130 N. Y. Supp. 2d 731, affirmed, 284 App. Div. 883, 134 N. Y. Supp. 2d 603 .....35, 67
Northern Crate & Lumber Co., 105 NLRB 218..... 43
Painters District Council No. 6, 97 NLRB 654..... 52
Perry Norvell Company, 80 NLRB 225..... 52
Plankinton Packing Co. v. Wisconsin Employment Relations Board, 338 U. S. 953..... 35
Polish National Alliance v. National Labor Relations Board, 322 U. S. 643.....23, 24
Punch Press Repair Corp., 89 NLRB 614..... 33
Rabouin v. NLRB, 195 F. 2d 906.....54, 90
Red Rock Company, 84 NLRB 521, enforced 187 F. 2d 76, cert. den., 341 U. S. 950.....43, 44
Republic Aviation Corp. v. NLRB, 324 U. S. 793.... 87
Retail Clerks v. Your Food Stores of Santa Fe, 124 F. Supp. 697, rev'd, 225 F. 2d 659.....37, 67, 75, 77, 90

Retail Clerks Union, 116 NLRB No. 99, 38 LRRM 1323 ..... 20, 89
Rice v. Santa Fe Elevator Corp., 331 U. S. 218..... 36, 60
Royal Palm Ice Co., 92 NLRB 1295, enforced, 193 F. 2d 569..... 43
Santa Cruz Fruit Packing Co. v. NLRB, 303 U. S. 453 25
Schatte v. International Alliance, etc., 182 F. 2d 158, cert. den., 340 U. S. 827..... 54
Schneider v. State, 308 U. S. 147..... 20, 85
Shelley v. Kraemer, 334 U. S. 1..... 86
Skyview Transportation Co., 90 NLRB 1895..... 28
Steele v. Louisville & N. R. Co., 323 U. S. 192..... 77
Texas & N. O. R. Co. v. Brotherhood, etc., 281 U. S. 548 77
Thomas v. Collins, 323 U. S. 516..... 38, 85
Thornhill v. Alabama, 310 U. S. 88..... 85
Tumey v. Ohio, 273 U. S. 510..... 2
United Automobile Workers v. Wisconsin Employment Relations Board, 336 U. S. 245 54
United Automobile Workers v. Wisconsin Employment Relations Board & Kohler Co., 351 U. S. 266 ..... 59, 63, 79
United Mine Workers v. Arkansas Oak Flooring Co., 351 U. S. 62..... 17, 37, 38, 50, 53, 71
United States v. Morton Salt Co., 338 U. S. 632.... 16, 32
Universal Car Co. v. Association of Machinists, 35 LRRM 2087 ..... 67, 76
Utah Labor Relations Board v. Utah Valley Hospital, ... Utah ....., 235 P. 2d 520..... 39
Ward Body Works, Inc., 103 NLRB 680..... 43
Weber v. Anheuser-Busch, Inc., 348 U. S. 468..... ..... 35, 36, 38, 60, 70, 78, 84, 90

W. E. R. B. v. Teamsters Union, 267 Wisc. 356, 66 N. W. 2d 318 ..... 30, 84
Woolworth Co. v. NLRB, 121 F. 2d 658 43

U. S. Constitution.

Amendment I 71
Amendment XIV 3, 20, 71, 85

Statutes.

Act of October 22, 1951, Public Law 189, 82nd Cong. 1st Sess., 65 Stat. 601 82
28 U. S. C. 1257(3) 2
Labor Management Relations Act, 1947, 61 Stat. 136, 29 U. S. C. 141 et seq.
Section 2(9) 54
Section 7 ..... 3, 20, 37, 38, 47, 54, 84, 86
Section 8(a)(1) 43, 46
Section 8(a)(3) 49
Section 8(a)(5) 46
Section 8(b)(1) 51, 52
Section 8(b)(2) 48
Section 8(b)(4) 39, 50, 58
Section 8(c) 71
Section 8(d) 66, 72
Section 9 49
Section 9(f) 70, 71
Section 9(g) 70, 71
Section 9(h) 37, 70, 71
Section 10(a) ..... 3 passim
Section 10(b) 71
Section 10(c) 71
Section 10(j) 63
Section 10(l) 63
Section 13 ..... 3, 84

Section 14(a) 38, 39
Section 14(b) 66
Section 202(c) 66
Section 203(b) 66, 67
Section 301 39
Section 302 40
Section 303 ..... 39, 58, 63

Legislative Materials.

Cong. Rec., Vol. 93 ..... 23, 50, 51, 52, 56, 57, 58, 69
Cong. Rec., Vol. 95 81
Cong. Rec., Vol. 99 ..... 81, 82
Cong. Rec., Vol. 100 81
H. Conf. Rep. No. 510, 80th Cong., 1st Sess. 50, 63, 65
H. Min. Rep. No. 245 on H. R. 3020, 80th Cong., 1st Sess. 50, 63, 64
H. R. 3020, 80th Cong., 1st Sess. 47, 49, 51
Leg. Hist. L. M. R. A., Vol. 2 ..... 50, 51, 52, 56, 57, 58, 70
Report of the Joint Committee on Labor Management Relations, No. 896, 80th Cong., 2nd Sess. 19, 25, 31, 53
S. 1264, 83rd Cong., 1st Sess. 81, 82
S. 2218, 83rd Cong., 1st Sess. 81
S. 2650, 83rd Cong., 1st Sess. 81
S. Min. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess. 32, 63
S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess. 50, 51, 55, 58, 64
S. Rep. No. 573 on S. 1958, 74th Cong., 1st Sess. 23, 36
S. Rep. No. 1150, 77th Cong., 2nd Sess. 85
S. Rep. No. 1211, 83rd Cong., 2nd Sess. 81

Miscellaneous Materials.

Allied Plans Biggest Network of Suburban Shopping Centers, Business Week, Jan. 15, 1955, p. 52..... 87

Brief for the NLRB as Amicus Curiae in Amalgamated Clothing Workers v. Richman Brothers, No. 173, October Term, 1954 34

Brief for the NLRB as Amicus Curiae in Garner v. Teamsters' Union, No. 56, October Term, 1953....34, 78

Brief for the NLRB as Amicus Curiae in Montgomery Building & Construction Trades Council v. Ledbetter Erection Co., No. 43, October Term, 1952... 34

Brief for the NLRB as Amicus Curiae in support of petition for rehearing in United Automobile Workers v. Wisconsin Employment Relations Board, Nos. 14 and 15, October Term, 1948..... 34

Builder Owner of Largest Shopping Center, Fortune, May, 1954, p. 44..... 87

Cutrater's Move to Suburbs, Business Week, Jan. 22, 1955, p. 47..... 87

Downtown Needs a Lesson From the Suburbs, Business Week, Oct. 22, 1955, p. 64..... 87

Feldblum, Jurisdictional "Tidelands" in Labor Relations, 3 Labor Law Journal 114..... 26

How to Expand Shopping Center Zones, The American City, Jan. 1956, p. 116..... 87

Memorandum for the NLRB as Amicus Curiae in Gilson Bros. v. Wisconsin Employment Relations Board, No. 383, October Term, 1949..... 33

NLRB 13 Ann. Rep. 34

NLRB 16 Ann. Rep. 27, 28

NLRB 19 Ann. Rep. 28

Restatement of Torts, Vol. IV..... 39

Roumell & Schlesinger, The Preemption Dilemma in Labor Relations, 18 U. of Detroit L. J. 135..... 28

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 41.

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, LOCAL NO. 427, AFL, ET AL.,

Petitioners,

vs.

FAIRLAWN MEATS, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

CITATIONS TO OPINIONS BELOW.

The opinions of the Court of Common Pleas (R. 148-156) and of the Court of Appeals, Summit County (R. 158-166), are unreported. The decision of the Supreme Court of Ohio, dismissing petitioners' appeal "filed as of right herein," for the reason that "no debatable constitutional question is involved" (R. 172), is reported in 164 O. S. 285, 130 N. E. 2d 237.

JURISDICTION.

The petition for a writ of certiorari was granted on May 7, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1257 (3).[1]

QUESTIONS PRESENTED.

1. The employer involved operates three stores in the State of Ohio, at which it sells meat and meat products to retail and wholesale customers. In the course of this business, the employer annually imports directly from other states merchandise valued at over $100,000, amounting to approximately fifteen per cent of its gross purchases. The employer also causes to be imported from other states merchandise valued at approximately $200,000 annually. The first question presented is whether the employer's business operations "affect commerce" within the meaning of the National Labor Relations Act.

2. For budgetary or other administrative reasons, the National Labor Relations Board refuses to assert its own jurisdiction unless the interstate operations of the employer involved in a labor dispute are substantially greater than that set forth in question numbered 1. The second question is whether the national Board's declination of jurisdiction vests in the states jurisdiction to apply to peaceful picketing arising out of a labor dispute state law

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[1] The federal questions were properly and timely raised by petitioners at all stages of the proceedings (R. 8, 13, 148, 166-167, 173, Tr. 8-69) and were discussed and decided adversely to petitioners by the Court of Common Pleas and by the Court of Appeals. In holding that the federal questions urged by petitioners were not "debatable", the Supreme Court of Ohio rejected petitioners' contentions on the merits (*Tumey* v. *Ohio*, 273 U. S. 510, 515; *Matthews* v. *Huwe*, 269 U. S. 262).

or policy which duplicates, parallels or conflicts with the policies of the national Act.

3. Whether a state may, consistently with Sections 7 and 13 of the National Labor Relations Act and the Fourteenth Amendment, enjoin peaceful picketing in front of the entrance to an establishment involved in a labor dispute, on the ground that the employer owns the property on which the pickets are walking and objects to its use for picketing, where the employer owns all of the property between the store entrance and the highway and maintains the entire area for use by its customers.

STATUTES INVOLVED.

The statutory provision principally involved is Section 10(a) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., 141 *et seq.*). That section reads as follows:[2]

> The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise. *Provided,* That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and

[2] Prior to the 1947 amendments, Section 10(a) read as follows: "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise."

transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

The other relevant provisions of the Act are reprinted in the Appendix, pp. 93-105, *infra*.

STATEMENT.

A. The Labor Dispute.

Fairlawn Meats, Inc., hereinafter referred to as Fairlawn, operates three stores in the vicinity of Akron, Ohio, at which it sells meat and related products to both wholesale and retail customers (R. 158-159; 46-47, 48-49).[3]

On May 10, 1952, Fairlawn entered into a preliminary agreement in which it agreed to recognize the Union as exclusive bargaining agent for its employees; to meet with the Union to negotiate a contract covering wages, hours, and other working conditions, and to incorporate in such contract a union security clause (R. 150; 7, 9). The contract proposed to Fairlawn by the Union pursuant to this agreement included a union-shop provision (R. 151; 176, 18-19).

Prolonged negotiations thereafter failed to produce agreement on substantive terms (R. 150, 159; 19, 20, 41, 78, 111-114). On February 1, 1954, Ekers, owner of Fair-

[3] The stores are located at 278 West Avenue, Tallmadge, Ohio, 2246 W. Market Street, Akron, Ohio, and the junction of U. S. Route 21 and State Route 176, West Richfield, Ohio (R. 1, 46). As reference to individual stores is made hereafter, they are described as the Tallmadge, Market Street and West Richfield stores.

lawn (R. 46), invited fifteen "key" employees of the Tallmadge store to a meeting at a local tavern after working hours (R. 75, 84-85, 131-132, 133). There he told them that he did not want them to join the Union (R. 19-20, 132, 77-78); that signing a contract with the Union would result in cutting down to a forty (40) hour week, and loss of overtime, and that the store would close on Sunday (R. 132-133).

On February 2, 1954, the Union voted to authorize a strike at Fairlawn if negotiations were not successfully concluded (R. 21, 22, 41). The next day, Ekers told the officers of the Union that he did not care to negotiate further (R. 150, 159; 22-23, 41, 79, 114-115). On February 4, 1954, the Union called a strike and established a picket line in front of the entrance of each of the three stores (R. 159; 115-116). The pickets carried placards reading: "On strike" (R. 155; 21, 33).

At the time the picketing began, eighteen of Fairlawn's employees were either members of the Union or had authorized the Union to represent them (R. 159; 116, 42-43). Pollock, President of the Union, testified that he believed that the stores employed approximately thirty-five employees and that the Union represented a majority (R. 155; 125-126, *cf.* R. 38). Five of the employees of the West Richfield store went on strike and participated in the picketing (R. 116, 28). These five were later joined by two part time employees (R. 159; 116-117; 126-127). Two other employees, who did not picket, remained away from work until February 11, 1954 (R. 159; 117-118).

On or about February 10, 1954 (R. 99), two days after Fairlawn filed its petition to enjoin the picketing, p. 16, *infra*, Thursby, manager of the Tallmadge store (R. 90,

99), prepared a petition (R. 85, 91, 97 98) declaring that the "employees of the Fairlawn Meats, Inc., hereby certify that there is no dispute or disagreement between us and our employer * * * and we are not on a strike against our employer, and we are not in favor of our employer signing any agreement that will force or compel us to join any union" (R. 151, 165; 85, 97, 185). Thursby himself circulated the petition among the employees at Tallmadge and asked them to sign (R. 90-91, 98-99, 133-134, 138).[4] At Market Street, Brigham, the manager, called the employees together and asked them to sign (R. 92, 104-105, 106). At West Richfield, Moyer, the manager, asked the employees to sign (R. 92, 107-108). In all, 41 employees signed the petition (R. 151; 185-186). After February 19, 1954, seven employees of the Tallmadge store joined the strike (R. 126-127, 128-129, 188A). On March 6, 1954, Thursby called employees Vargo, Herbruck and Tandarich into his office and inquired whether, since they had joined the Union, they would like to resign their jobs. Thursby dictated resignation forms, and the employees signed them (R. 36, 74, 100-103, 141, 184, 186, 187). After learning that employee Carpenter had joined the strike, Ekers went to see him and induced him to sign a statement of resignation (R. 72-74, 81-82, 87-88, 89, 185).

B. PROCEEDINGS BELOW.

On February 8, 1954, Fairlawn filed in the Court of Common Pleas, Summit County, Ohio, a petition for permanent injunction and an application for temporary restraining order prohibiting all picketing by defendants

[4] Employee Rodocker testified at the hearing that he signed "in order to protect my job" (R. 134; see also R. 138).

(R. 1-4).[5] In its petition Fairlawn alleged that it employed fifty (50) employees at its three stores (R. 1); that its employees have been "free from influence by the plaintiff as to whether they should deal with the plaintiff individually * * * or collectively" (R. 2); that the employees had freely chosen to represent themselves individually rather than to be represented by the defendant Union (R. 2); that "no bona fide labor dispute" exists between plaintiff and its employees (R. 3); that the Union was engaged in a conspiracy "to compel and coerce the plaintiff to in turn coerce and compel his employees * * * to become members of * * * defendant union" (R. 2); and that pursuant to that conspiracy defendant had "caused a number of individuals to picket the meat markets" (R. 3).[6]

The Union filed an amended answer (R. 6-9), alleging, *inter alia,* that Fairlawn's business operations affected interstate commerce within the meaning of the National Labor Relations Act; that the controversy arose out of a labor dispute within the meaning of that Act; that the strike and picketing were entirely peaceful and that the objective was lawful (R. 7); that the national Board had

[5] Upon preliminary hearing, the trial court granted a temporary restraining order prohibiting picketing at the Tallmadge and Market Street stores, but denied relief against picketing at the West Richfield store on the theory that at the latter store employees had left work to go on strike while at the former stores they had not (R. 4-5).

[6] The defendants removed the case to the United States District Court for the Northern District of Ohio, Eastern Division, and in that court filed a motion to dismiss, alleging *inter alia,* that the state court was without jurisdiction to entertain the petition or to grant any of the relief requested because the subject matter of the action had been preempted by Congress in the National Labor Relations Act (Tr. 504-505). The district court, finding prerequisites of removal jurisdiction wanting, remanded to the state court (Tr. 503).

exclusive jurisdiction to hear and determine the matters complained of, and that the state court was deprived by the national Act of jurisdiction to entertain the action (R. 8). In its reply to the amended answer, plaintiff denied that the national Board's jurisdiction was exclusive and asserted that the state court had full jurisdiction (R. 10). The reply further alleged that defendants had engaged in a "secondary boycott" by inducing plaintiff's chief supplier of meat, pursuant to threats, to refuse to sell meat to plaintiff (*Ibid*).

1. The Interstate Commerce Facts.

The uncontroverted evidence shows that Fairlawn annually purchases for resale to its retail and wholesale customers merchandise valued at between $750,000 and $1,000,000 (R. 49-50). Its purchases of meat and other supplies from June, 1952 to June, 1953, exceeded $873,000 (R. 61-62, 65). Of this amount, merchandise valued at over $103,000, was shipped directly to Fairlawn from outside the State of Ohio (R. 50, 66).[7]

Ekers admitted that approximately fifteen per cent of Fairlawn's total purchases are shipped to it directly from outside of Ohio (R. 50).

Fairlawn's principal suppliers of dressed beef are the Gibbs and Peerless Packing companies in Cleveland, Ohio (R. 49, 54-55). During 1953, Peerless sold to Fairlawn dressed beef valued at over $221,000 (R. 143). More than half of the cattle from which Peerless processes dressed beef is shipped to Peerless from other states (R. 144).

[7] In a single month prior to the strike, Fairlawn purchased merchandise valued in excess of $73,000, of which almost $12,000 represented direct out-of-state shipments (R. 67).

During 1953, Fairlawn purchased over $146,000 of merchandise from Gibbs (R. 95, 147, 188). Gibbs, likewise, imports from other states the major portion of the cattle which it slaughters and dresses for sale to customers like Fairlawn (R. 94, 147, 187).

2. The Union Majority Issue.

In addition to the evidence tending to show employer interference, the Union, without waiving its jurisdictional objection (R. 164; 125), adduced evidence tending to show that by the time of the trial approximately twenty-six of Fairlawn's employees had either joined the Union or authorized it to represent them (R. 128-129, 147, 188A, 130, 141-142).

3. The Trespass Issue.

Fairlawn owns approximately 200 feet of property on the east side of State Route 21 in Richfield Township on which the West Richfield store is located (R. 31, 46, 55, 58). The store is set back approximately 50 feet from the curb line of the highway (R. 31). The area between the store and the highway is vacant; a semicircular driveway, with both exits on Route 21, is utilized by automobiles to gain access to the store and to a group of other business houses adjacent to and south of the store (R. 31, 32, 33, 147, D. Exhs. 18-24). The vacant area is used for parking (R. 30, 31-32, 58). There is no sidewalk either paralleling the highway or in front of the entrance to the store (R. 84). Fairlawn's property rights extend "out to the road" (R. 30).

Fairlawn leases approximately 285 feet of property along West Avenue, on which the Tallmadge store is lo-

cated (R. 48, 56, 58). That store, like the West Richfield store, is "in the country" (R. 24, 55). The location of the store with reference to the highway, the customer driveways leading to and from the store to the highway, the parking area in front of the store and the absence of sidewalks are similar to the situation at West Richfield (R. 25, 59, 83-84, 118-119, D. Exh. 19). The lessee's property rights at Tallmadge extend to the center of the road (R. 59). Those few pedestrians who have occasion to traverse the property walk "just off of the pavement" of the street on Fairlawn's leased property (R. 59).

Fairlawn's Market Street store is located in one portion of a building which houses the Sparkle Supermarket (R. 47, 58). Fairlawn owns no interest in the building itself or in the adjacent property (R. 47, 58). At this store also, only a parking area separates the store building from the street (R. 58). There is very little pedestrian traffic (R. 58).

At all three locations, the pickets walked in front of the store, paralleling the street or highway, at a distance variously estimated at from three to twenty feet from the curb line (R. 25-26, 29-30, 45, 55-56, 59, 118-119, 121).[8] Pollock testified that it was his "belief and • • • understanding" that the pickets were walking "on a strip of ground that the public had access to" (R. 127-128, cf. 45). Fairlawn objected to the use by the pickets, employees and non-employees alike, of its property at Richfield and Tallmadge for the purpose of picketing (R. 159; 56-57; Tr. 240-241).

[8] The pickets frequently walked in the paved area—the driveways (R. 25, 33, 44-45). The evidence shows, however, that at no time did the pickets obstruct ingress or egress to the stores (R. 26), and there is no contrary finding (Cf. R. 155).

4. The Secondary Boycott Issue.

Ekers testified that after the picketing began he was followed by Union representatives to the Gibbs and Peerless plants when he went to purchase meat there, and that representatives of these companies refused to sell meat to him (R. 53-55, 80, 82, 90). Evidence was also adduced that representatives of another local union affiliated with the Amalgamated Meat Cutters and Butcher Workmen of North America, the bargaining agent for Gibbs and Peerless employees (R. 70), induced the Gibbs and Peerless managements to stop selling meat to Fairlawn because of its involvement in the labor dispute with petitioner (R. 68-69, 70-71).[9]

C. OPINIONS OF THE COURTS BELOW.

The Court of Common Pleas held that because, as the evidence showed and petitioners conceded, the volume of Fairlawn's interstate imports was insufficient to satisfy the jurisdictional policy standards promulgated by the National Labor Relations Board on July 15, 1954, as the criteria for assertion of its own jurisdiction over retail stores,[10] "if the Board originally had jurisdiction, it had

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[9] The Court of Appeals recited in its opinion that "on one * * * instance, while [Ekers was] at the place where he bought meat for resale, the air was let out of [his] tires" (R. 159; 53). There is not a scintilla of evidence in this record, however, which connects the defendant union or any of its agents with this incident, and the court seems to have placed no reliance upon it (R. 69).

[10] As correctly stated in the opinion (R. 149-150), the Board's current standards for assertion of jurisdiction over retail stores requires annual direct out of state imports of $1,000,000, or indirect imports of $2,000,000. Press release No. 445, "NLRB Announces Changes in Standards for its Exercise of Jurisdiction"; July 1, 1954; Press release No. 449, *ibid*, July 15, 1954; *Hogue*

ceded that to the state court" (R. 150). On the merits, the court found the picketing was entirely peaceful (R. 155), but that the picketing was illegal because its purpose was to compel Fairlawn to enter a union-shop agreement at a time when the Union did not represent a majority of Fairlawn's employees (R. 151, 155). The court stated that since the object of the picketing was organizational, rather than to remedy employee grievances, it did not arise out of a "labor dispute", and that "the banners, which recited: 'On strike,' did not state the truth." (R. 155). The court found that although "the pickets and defendants believed they were acting lawfully", once it developed that Fairlawn had more employees than the Union had estimated, and the Union therefore did not have a majority, they were guilty of "a conspiracy to do an unlawful act" (R. 155). The court also stated that there was "evidence of probative value to sustain a charge of secondary boycott" (R. 156). This evidence, said the court, tended to support the allegation of unlawful objective (ibid). The court entered a permanent injunction prohibiting the defendants from: (1) picketing the stores and places of business of the plaintiff; (2) trespassing on plaintiff's property, and (3) attempting to persuade

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& Knott Supermarkets, 110 NLRB 543. Since Fairlawn's annual gross purchases did not exceed $900,000, it is clear, and petitioners throughout conceded, that the Board would not, under these standards, have asserted jurisdiction over a charge alleging that by its picketing at Fairlawn's premises the Union was engaging in an unfair labor practice. As for the alleged "secondary boycott" involving the Union's activities with respect to the Gibbs and Peerless packing companies, however, it is by no means clear that the Board would not have entertained a charge by Fairlawn. *Cf. Local Union 25* v. *New York, New Haven & H. R. Co.*, 350 U. S. 155; *NLRB* v. *Associated Musicians,* 226 F. 2d 900, 907 (C. A. 2), cert. denied, 351 U. S. 962.

any of plaintiff's suppliers to refuse to sell and deliver merchandise to the plaintiff (R. 156-157).

On appeal, the Court of Appeals considered *de novo* questions of both law and fact (R. 158, 160). It acknowledged petitioners' challenge to the jurisdiction of state courts to enjoin the exercise of "its right to picket the places of business of Fairlawn Meats" (R. 160). The court held, however, that Fairlawn's business did not affect interstate commerce within the meaning of the national Act because its business "is purely of a local character"; the volume of its business "is not large"; it "does not sell any of its products outside of the state of Ohio"; and its "purchases from out of this state, both direct and indirect, do not constitute a large portion of the products it offers for sale to the meat-consuming public in Akron and Summit County" (R. 161). The court concluded that "there is no burden placed upon, or obstruction of, interstate commerce by any action taken by the parties to this case" (Ibid). In view of this conclusion, the court stated that it found it unnecessary to discuss the Board's "jurisdictional yardsticks * * * to determine whether the National Labor Relations Board will assume jurisdiction" (R. 160).

On the merits, the court held that the object of the picketing was "forcing the great majority of employees to join the Union" (R. 163). Pursuit of this object by picketing, the court held, is prohibited alike by the national Act and the law of Ohio (R. 163-165). The court found that the picketing "was part of a plan to avoid an election" by the Board (R. 164). The court said (R. 165):

> Where, then, as in this case, no election has been held under the federal regulations, and it is shown that

> many more than a bare majority have indicated a desire not to organize and join the Union, it would be an 'unfair labor practice' to compel Fairlawn Meats to compel its employees to join a union contrary to their already expressed wishes.

The court concluded that (R. 165):

> * * * since the picketing herein was for organizational purposes only, and not to secure a settlement of grievances among the employees, and since the picketing in part was done on land owned by or under lease to Fairlawn Meats, and since the Union by threats and coercion instituted a secondary boycott against Fairlawn Meats, the picketing, although not accompanied by violence, was nevertheless unlawful under the announced policy in Ohio.

The court entered a permanent injunction against defendants in the same terms as the injunction which had been entered by the trial court (R. 167-168).

While refusing to set aside the injunction, the Supreme Court of Ohio did not disclose the reasons which led it to conclude that the constitutional questions raised by petitioners were not "debatable" (R. 172). We must assume, therefore, that it may have adopted the reasoning of either or both courts below.

SUMMARY OF ARGUMENT.

The conduct of the union and of the employer upon which the courts below passed is unquestionably of the kind which is regulated by the national Act. Congress determined that where such conduct occurs in "local" industries, whose operations affect interstate commerce, the states may regulate it if a cession agreement is entered into between the national Board and a state agency pursuant to Section 10(a). The national Board is barred from entering into such cession agreements, however, unless the state has adopted a statute which is consistent, both in terms and as interpreted, with the national Act. The purpose of so restricting the Board's power to cede is to insure "that the national policy will not be thwarted even in the predominantly local enterprises to which the proviso applies." *Amalgamated Association* v. *Wisconsin Board,* 340 U. S. 383, 397.

Congress adopted the proviso to Section 10(a) empowering the Board to cede jurisdiction to the states "to meet situations made possible by *Bethlehem Steel Co.* v. *New York State Labor Relations Board,* 330 U. S. 767, where no state would be free to take jurisdiction of cases over which the national Board had declined jurisdiction." *Algoma Plywood Co.* v. *Wisconsin Board,* 336 U. S. 301, 313. Congress thus invited the states to regulate labor relations in areas over which the Board for budgetary or administrative reasons declined to exercise its powers, but it conditioned its invitation on passage by the states of laws consistent with the national Act. States, like Ohio, which fail to meet the conditions which Congress imposed, and which therefore may not acquire jurisdiction by ces-

sion from the Board, may not apply their own laws or policies to conduct which the Act covers, regardless whether, in any particular instance, the applicable state rules or procedures are consistent or in conflict with those of the national Act. "* * * when state enforcement mechanisms so helpful to federal officials are to be excluded, Congress may say so, as in the Taft-Hartley Act, 29 U. S. C. Supp. § 160(a)." *California* v. *Zook*, 336 U. S. 725, 732.

A. Fairlawn's direct and indirect imports from other states, which the courts below ignored, are far in excess of *de minimis*. As this Court has often recognized, Congress determined that labor disputes involving employers such as Fairlawn should be subject to and regulated by the rules and policies of the national Act. *Amalgamated Association* v. *Wisconsin Board*, 340 U. S. 383, 391.

B. The national Board's declination, for budgetary or other administrative reasons, to exercise its jurisdiction over employers like Fairlawn to whom the national Act applies, does not remove such employers from the coverage of the Act. The standards which the Board invokes to effectuate its self-imposed restrictions are entirely different from the standards which Congress adopted, and to which the Board adheres, in determining coverage. Power which the Board declines for budgetary or other administrative reasons to exercise does not thereby cease to exist. Cf. *United States* v. *Morton Salt Co.*, 338 U. S. 632, 647, 648. After enactment of Taft-Hartley the Board has uniformly acknowledged that it can vest regulatory power in the states only by a cession agreement executed in accordance with the proviso to Section 10(a), and not by its mere declination to assert jurisdiction.

The argument for treating administrative declination as the equivalent of removal of the national Act from the enterprises involved rests on the fact that parties to labor disputes in such enterprises are deprived by the declination of access to the remedial forum which Congress provided. "Such elimination of the Board does not, however, eliminate the applicability of the National Labor Relations Act * * *. The Act goes further. The instant employer, employees and union are controlled by its applicable provisions, and all courts, state as well as federal, are bound by them." *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U. S. 62, 74.

C. Preemption aside, Congress obviously did not intend to permit the states to invoke rules and policies which conflict with Congress' policies in labor disputes to which the Act applies, even where the Board is unable or unwilling fully to effectuate Congress' policies by undertaking enforcement proceedings of its own. In the Brief for the United States in *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, No. 55, Oct. Term, 1946, pp. 36-37, the Board suggested that states should be empowered to regulate matters covered by the Act in areas where the Board for budgetary reasons declines to assert jurisdiction only if the state's policy in handling such matters is the "same" as the federal policy. The need for precluding conflicting state policy in these areas, which Congress recognized and met in the proviso to Section 10(a), forecloses treating the Board's declination to assert jurisdiction as an invitation to the states to apply conflicting policies of their own.

D. Although the Ohio courts held the picketing illegal on a theory parallel to one of the rules of the federal Act,

analysis shows that, as applied to this dispute, Ohio's labor relations policies are in sharp conflict with federal policy. The Ohio courts ignored Fairlawn's unfair labor practices, which, under the policies of the federal Act, would have been enjoined. They disregarded the fact that the evidence upon which Fairlawn relied to establish the Union's lack of majority was the product of the employer's unfair labor practices, and was therefore neither probative nor admissible under the federal rules. The order entered by the state courts prohibits all picketing and is far broader than the order the national Board would have entered, even if the Board had made identical findings as to the purpose of the picketing and the union's lack of majority. The difference in the prohibitory scope of the decree stems from the fact that Ohio outlaws peaceful strikes and picketing for organizational and recognition purposes which federal law sanctions. The opinions below show that Ohio invokes in labor disputes concepts, like "conspiracy," which Congress repudiated and treats as unlawful conduct which Congress determined to leave free. In addition, by authorizing employers to resort directly to its courts for injunctive relief against peaceful conduct amounting to unfair labor practices, Ohio adheres to the "court approach" which Congress deliberately eschewed as being inconsistent with its objective of improving relations between management and labor in all industries to which federal power under the Commerce Clause extends.

E. The legislative history shows, and the opinions of this Court confirm, that Congress adopted the cession plan as the alternative to leaving "uncontrolled large areas of industrial conflict," *i. e.*, the areas over which the Board declined, for budgetary or other administrative reasons,

to assert jurisdiction. *Bethlehem Steel Co.* v. *New York State Labor Relations Board,* 330 U. S. 767, 784. The language, context and purpose of the proviso unite in establishing that Congress intended to preclude the states from exercising jurisdiction under their own laws over cases arising in enterprises over which the Board declines to assert jurisdiction, unless the states undertake to treat such cases just as they would be treated if the Board asserted jurisdiction. Congress' reasons for imposing limitations on the Board's power to cede regulatory power to the states would be thwarted if the states were held free to regulate in the absence of a cession agreement. That parties over whom the national Board declines to assert jurisdiction are left without remedy. That result is attributable only to the states, which, by failing to pass statutes consistent with the federal Act, have precluded the national Board from exercising its power to cede jurisdiction over such enterprises to the states. If, as Congress hoped and anticipated, the states had passed consistent laws there would be no room for the argument that the Board's declination to assert jurisdiction leaves anyone without remedy.

Even though the states have failed to bring their laws into conformity with federal policy, Congress has thus far deemed it more important to continue to exclude inconsistent state policies and procedures than to assure that a remedy of some kind is available to all parties under all circumstances. Report of the Joint Committee on Labor Management Relations, 80th Cong., 2nd Sess., pp. 30-31. Judgments of this kind are for Congress to make, and the wisdom of its decision is not an appropriate subject of judicial inquiry.

F. By treating the pickets, employees and non-employees alike, as trespassers because in picketing near the store entrances they walked over territory in which Fairlawn has a proprietary interest, the courts below trenched upon the exercise of rights which Section 7 of the Act and the Fourteenth Amendment protect against state infringement. By virtue of the location of the stores, pickets, like casual pedestrians, must walk on "private property" or they cannot picket the stores at all. If Ohio can prohibit peaceful picketing at the store entrances on the "trespass" theory in this case, then merely by denying permission to picket in areas which they have thrown open to employees, customers and casual pedestrians, store owners can foreclose all picketing in suburban shopping centers, a large and growing segment of the nation's retail industry. Because of the national Act's objective of protecting neutral employers against involvement in labor disputes, the Board holds that pickets must confine themselves to the area adjacent to the entrance of the establishment involved in the dispute. To reconcile this limitation with effectuation of the right to picket at the situs of the primary dispute the Board holds that the legality of peaceful picketing cannot "depend on title to property." *Retail Clerks Union,* 116 NLRB No. 99, 38 LRRM 1323, 1324. This is clearly a case in which "some dislocation of property rights [is] necessary in order to safeguard the right to collective bargaining." *National Labor Relations Board* v. *Stowe Spinning Co.,* 336 U. S. 226, 232; *National Labor Relations Board* v. *Denver Bldg. & Construction Trades Council,* 341 U. S. 675, 685; *Schneider* v. *State,* 308 U. S. 147, 162-165.

ARGUMENT.

Introduction.

The central issue in this case, as in No. 50, this term, is whether, in the absence of a cession agreement between the national Board and a state agency executed pursuant to Section 10(a) of the national Act, a state may apply to an enterprise which is subject to the national Act, but over which, for administrative reasons, the Board would decline to assert jurisdiction, a state policy which parallels, duplicates or conflicts with the labor relations policies which Congress adopted. Stated otherwise, the question is whether the Board's administrative declination to assert its jurisdiction amounts to a cession of regulatory power to the states.

Those who contend that the national Board's declination should leave the states free to apply their own laws urge that otherwise parties affected by the Board's declination may be denied all remedy against infringement of rights which the national Act confers upon them. The implication is that Congress could not have intended such a result. What this argument overlooks is that Congress invited the states to participate in enforcement of national labor policy in those areas in which the Board chose not to exercise its authority. But it conditioned its invitation upon the passage by the states of laws consistent with the national Act. Thus far the states have failed to pass such laws. Present inability of the states to accord a remedy for conduct violative of the national Act is, therefore, not a neces-

sary consequence of Congress' action; Congress is not fairly chargeable with having intended to leave parties subject to the Act remedyless; that result flows rather from inaction by the states themselves. It would seem to go without saying that the failure of the states to accept the conditions imposed by Congress upon their exercise of regulatory power does not warrant opening for judicial redetermination Congress' decision as to the circumstances under which the states should be permitted to play a role.

In succeeding portions of this brief we shall show that each of the theories which have been advanced to authorize state regulation in the absence of a cession agreement between the national Board and a state agency would nullify the proviso to Section 10(a); that the result of such nullification would be either to permit the states to apply laws inconsistent with the national Act or, if the application of consistent laws only were permitted, to transfer from the Board where Congress placed it, to the courts, the function of determining consistency in the first instance. We conclude that, if the clear intention of Congress is to be effectuated, state action which would fall if the Board did not decline to assert jurisdiction,[11] cannot, in the absence of a cession agreement, be permitted to stand.

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[11] Ohio decisions make it clear that but for its holding that the employer in this case was not subject to the national Act, either as a constitutional matter or because of the Board's declination to assert jurisdiction, the court below would have set aside the injunction on constitutional grounds. *Grimes & Hauer, Inc.* v. *Pollock*, 163 O. S. 372, 127 N. E. 2d 203, cert. denied, 350 U. S. 900.

I.

THE NATIONAL LABOR RELATIONS ACT APPLIES TO THE LABOR DISPUTE WHICH GAVE RISE TO THE INSTANT CASE.

A. Fairlawn's Operations Affect Interstate Commerce Within the Meaning of the National Act.

The legislative history of both the Wagner and Taft-Hartley Acts emphasizes, as this Court has frequently held, that Congress deliberately enacted these laws to govern labor relations in all industries which Congress' power under the Commerce Clause could reach. S. Rep. No. 573 on S. 1958, 74th Cong., 1st Sess., pp. 7, 19; *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601, 606, 607; *Polish National Alliance* v. *National Labor Relations Board*, 322 U. S. 643, 647; *Amalgamated Association, etc.* v. *Wisconsin Board*, 340 U. S. 383, 391.

In deciding "what matters are to be taken over by the central Government and what to be left to the States" (*Polish National Alliance*, case *ibid.*), Congress drew the line at labor disputes which could not "affect" interstate commerce. Only those disputes did Congress regard as of "purely local significance." S. Rep. No. 573, *supra*, p. 7. Congress rejected the proposal to withhold federal regulation from labor disputes involving "very small employer units." *Ibid*, see also, 93 Cong. Rec. 3834. And it did not intend to make application of the national Act depend on whether the volume of commerce which might be affected by a labor dispute was "great or small." *National Labor Relations Board* v. *Fainblatt*, 306 U. S. at 607.

It has long been settled that the national Act applies to

business enterprises "which in isolation might be deemed to be merely local" (*Polish National Alliance, etc.* v. *National Labor Relations Board*, 322 U. S. 643, 648), if such enterprises regularly cause to be imported from or exported to other states a quantity of merchandise or supplies greater than that to which courts apply the "maxim *de minimis non curat lex.*" *National Labor Relations Board* v. *Denver Bldg. & Construction Trades Council*, 341 U. S. 675, 683-685; *National Labor Relations Board* v. *Fainblatt, supra; Amalgamated Association, etc.* v. *Wisconsin Board, supra.* Under this test "local" businesses which import merchandise from other states of far less value than the more than $100,000 worth of goods which Fairlawn annually imports directly, and the approximately $200,000 worth of good which it imports indirectly, are subject to the Act.[12]

The Court of Appeals below therefore clearly erred in holding that because Fairlawn's business is of "a local character," and because its out of state purchases "do not constitute a large portion" of its total purchases, Fair-

[12] See, e. g., *National Labor Relations Board* v. *Denver Bldg. & Construction Trades Council*, 341 U. S. 675, 684 (annual purchases by local electric work contractor of over $55,000 from out of state held "not negligible"); *National Labor Relations Board* v. *Stoller*, 207 F. 2d 305, 306-307, cert. den., 347 U. S. 919 (C. A. 9) (annual out of state purchases of approximately $12,000 held to bring local laundry and dry cleaning establishment within reach of the Act); *National Labor Relations Board* v. *Daboll*, 216 F. 2d 143, 144 (C. A. 9), cert. den., 348 U. S. 917 (imports of approximately $77,000 annually held sufficient to subject local plastering contractor to Board's jurisdiction); *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 196 F. 2d 424, 426 (C. A. 5), aff'd *sub silentio*, 344 U. S. 344 (imports valued at more than $82,000 held adequate to subject local soft drink bottler to federal jurisdiction); *National Labor Relations Board* v. *El Dorado Water Co.*, 195 F. 2d 950, 952, 953-955 (import of supplies valued at $65,000 for use in maintaining facilities held to subject local water company to national Act).

lawn's labor relations are not subject to the national Act.[13] Cf. *Report of the Joint Committee on Labor Management Relations,* No. 986, Pt. 1, 80th Cong., 2nd Sess., p. 31, quoted p. 81, *infra.*

B. The Fluctuating Administrative Practices and Policies of the National Labor Relations Board in Exercising Its Jurisdiction Do Not Determine the Coverage of the National Act.

The suggestion of the Court of Appeals below (R. 160-161), that the Board's "jurisdictional yardstick * * * may be helpful" in determining whether a particular enterprise is subject to the national Act, misconceives the nature and purpose of the yardsticks. From virtually the inception of the Wagner Act the Board declined to handle all of the cases to which the Act applied, and over which the Act vested the Board with jurisdiction. As the Board stated in its brief to this Court in *Bethlehem Steel Co.* v. *New York State Labor Relations Board,* No. 55, Oct. term, 1946, pp.

[13] Fairlawn's direct imports from other states amount to approximately 15% and its indirect imports to approximately 20% more of its total purchases (see pp. 8-9, *supra*). Yet even if far less than 30% of Fairlawn's supplies came from other states the Act would be applicable, for the statute "cannot be applied by a mere reference to percentages". *Santa Cruz Fruit Packing Co.* v. *National Labor Relations Board,* 303 U. S. 453, 467. See also, *National Labor Relations Board* v. *Cowell Portland Cement Co.,* 108 F. 2d 198, 201 (C. A. 9) (interstate business only 10% of gross business); *J. L. Brandeis & Sons* v. *National Labor Relations Board,* 142 F. 2d 977, 979-980 (C. A. 8), cert. den., 323 U. S. 751 (interstate sales only .0024% of total); *Barton Brass Works,* 78 NLRB 431, 432, out of state sales of $28,000, amounting to 7% of total, held not *de minimis,* quoting *National Labor Relations Board* v. *Suburban Lumber Company,* 121 F. 2d 829, 832 (C. A. 3); "*De minimis* in the law has always been taken to mean trifles —matters of a few dollars or less".

67-68: "The necessity for this abnegation is in large part budgetary. With the appropriations available to it there has always been a limit to the case load which the Board can handle." The Board decided that it would better effectuate the policies of the national Act if it were to devote its limited funds, personnel and other resources to handling labor disputes in industries which have a relatively large impact on interstate commerce, than to handle all the cases as they are filed, thereby running the risk that it might be unable to handle some cases involving major interstate industries. That conclusion led the Board to announce that it would not "effectuate the policies of the Act" to assert its jurisdiction over certain relatively local enterprises. *National Labor Relations Board* v. *Denver Bldg. & Construction Trades Council,* 341 U. S. 675, 684.

The area over which from time to time the Board declined to assert its jurisdiction has both expanded and contracted. This the Board explained in its brief in *Haleston Drug Stores, Inc.* v. *National Labor Relations Board* (No. 12412, C. A. 9, 1951), 187 F. 2d 418, 421: "Because both case-load and budget vary from time to time * * * cases which, at one period, warrant an assertion of jurisdiction may not warrant it at another period, and *vice versa.*"[14]

Prior to 1947, the Board manifested its declination to assert jurisdiction both by adopting general policies applicable to certain industries or classes of cases and, in other areas, on a case by case basis. See Brief for the United States in *Bethlehem Steel Co.* v. *New York State Labor Relations Board, supra,* p. 70. Before 1947, the Board generally declined to assert its jurisdiction in cases arising

[14] Quoted in Feldblum, *Jurisdictional "Tidelands" in Labor Relations,* 3 Labor Law Journal 114, 115.

in the building construction industry. After 1947, in deference to the legislative history which showed that Congress was particularly concerned with eradicating some of the newly defined union unfair labor practices which were prevalent in that industry, the Board changed that policy.[15]

In 1950, primarily for the purpose of clarifying the areas in which it would and would not assert jurisdiction, the Board attempted to codify the self-denying policies which it had developed during the preceding years.[16] These standards were framed largely, although not exclusively, in terms of the dollar volume of goods directly and indirectly shipped to or received from out of state sources by the business enterprise involved in the dispute.[17] The amounts varied depending on whether shipments were made to or were received from out of state sources, and on whether the effect on interstate commerce of the employer's operations was "direct" or "indirect." In some respects the 1950 codification expanded the area over which the Board would assert jurisdiction. For example, prior to 1951, the Board declined to assert jurisdiction over taxicab companies which served terminals of interstate carriers on the ground that their operations were "essentially local

[15] NLRB, Sixteenth Annual Report (Gov't. Print. Off., 1952) pp. 34-36. The report also notes at p. 34 that "Between 1947 and the adoption of the new standards in 1950, the Board asserted jurisdiction in a number of cases in the building industry, where jurisdiction probably would not be taken under the [1950] standards."

[16] See mimeograph release of National Labor Relations Board, October 6, 1950, entitled "NLRB Clarifies and Defines Areas in Which it Will and Will Not Exercise Jurisdiction," cited in *National Labor Relations Board* v. *Denver Bldg. & Construction Trades Council, supra.*

[17] NLRB, Sixteenth Annual Report (Gov't. Print. Off., 1952) pp. 15-16.

in character." *Skyview Transportation Co.*, 90 NLRB 1895, 1897. In January, 1951, the Board began to assert jurisdiction over such companies on the ground that they were "instrumentalities of commerce." *Skyview Transportation Co.*, 92 NLRB 1664, 1665. In other respects, the area over which jurisdiction would be asserted was narrowed. See note 15, *supra*.

In 1954, the Board announced a general revision of its policies with respect to assertion of jurisdiction. Change was accomplished largely by raising the dollar volume of interstate commerce for the various classes of enterprises involved.[18] Certain enterprises over which the Board had asserted jurisdiction under the 1950 standards whenever the statutory *de minimis* standard was met, such as utilities, local street railway and bus systems, companies operating as an integral part of a multistate enterprise, operations which affected national defense, and others, were subjected to new dollar-volume tests.[19] In other industries, such as taxicab companies, where the Board had previously asserted jurisdiction if a dollar volume test was met, the Board thereafter declined to assert jurisdiction regardless of the volume of interstate commerce affected.[20] The 1954 standards have not been static, nor have they proved easy to apply.[21]

The Board stated that its 1954 revision was grounded

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[18] NLRB, Nineteenth Annual Report (Gov't. Print. Off., 1955), pp. 2-5.

[19] Compare NLRB, Nineteenth Annual Report, *supra*, pp. 3-5, with Sixteenth Annual Report, *supra*, pp. 23-39.

[20] Compare *Skyview Transportation Co.*, 92 NLRB 1664, with *Checker Cab Co.*, 100 NLRB 683.

[21] Roumell & Schlesinger, *The Preemption Dilemma in Labor Relations*, 18 U. of Detroit L. J. 135, 148 (January, 1955).

in the same considerations which had led the Board, from the beginning, to decline to handle cases involving relatively "local" enterprises. These were (*Breeding Transfer Company*, 110 NLRB 493, 497):

> (1) the problem of bringing the caseload of the Board down to manageable size, (2) the desirability of reducing an extraordinarily large caseload in order that we may give adequate attention to more important cases, (3) the relative importance to the national economy of essentially local enterprises as against those having a truly substantial impact on our economy, and (4) overall budgetary policies and limitations.

The nature and purpose of the standards establish that they were not designed and cannot serve to define or limit the coverage of the national Act. The Board has always acknowledged that "* * * the statutory test for legal jurisdiction under the Act which we administer is different" from the "self-denying rule" (*National Labor Relations Board* v. *Red Rock Co.*, 187 F. 2d 76, 78 (C. A. 5), which the Board creates for purely administrative reasons. *East Newark Realty Corp.*, 115 NLRB No. 75. As the Board stated in the *East Newark* case, *supra*, with respect to an employer over whom it declined to assert jurisdiction pursuant to its 1954 policy, "there can be no question but that this Employer's operations affect commerce within the meaning of the Act."

That the Board in the area affected by its standards declines to exercise jurisdiction only as a matter of administrative policy itself shows that the enterprises involved are covered by and subject to the national Act. If they were not subject to the Act there would be no occasion for the Board to exercise administrative discretion; it would

be compelled to refrain from exercising jurisdiction as a matter of law. Accordingly, the federal courts of appeals have uniformly held that the Board's "self-imposed rule is not jurisdictional." *National Labor Relations Board* v. *Daboll*, 216 F. 2d 143, 144 (C. A. 9), cert. den. 348 U. S. 917; *National Labor Relations Board* v. *Red Rock Co.*, 187 F. 2d 76, 78 (C. A. 5), cert. den. 341 U. S. 950; *National Labor Relations Board* v. *Dixie Terminal Co.*, 210 F. 2d 538, 539 (C. A. 6), cert. den. 347 U. S. 1015; see also, *Wisconsin Board* v. *Teamsters' Union*, 267 Wisc. 356, 365, 66 N. W. 2d 318, 323; cf. *National Labor Relations Board* v. *Baltimore Transit Co.*, 140 F. 2d 51, 54 (C. A. 4), cert. den. 321 U. S. 795.

The Board's new policy standards, like the old, do not even purport to determine that it is not appropriate that the enterprises affected be governed by federal law or that state law rather than federal should apply to them. The majority of the Board said in the *Breeding* case, *supra*, that "a desire to establish broader State jurisdiction is in no wise a factor in our decision." 110 NLRB at 497.

To accord to the standards the effect of limiting the coverage of the national Act would be to permit the Board to reverse Congress' judgment as to "what matters are to be taken over by the central Government and what left to the States." Under the policy standards, the Board's assertion of jurisdiction turns on whether the volume of commerce affected is "great or small," and the standards exclude hundreds of thousands of employees of "small employer units." Congress, however, refused to set quantitative commerce limits to the Act's coverage, and it intended the Act's protection to extend as well to employees of small employers as to employees of larger concerns, pp. 23-24, *supra*.

When Congress amended the Act in 1947 it was well

aware that for budgetary reasons the Board "could not effectuate the policies of the Act committed to it over the whole range of its authority" (*Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U. S. 767, 778, separate opinion of Mr. Justice Frankfurter), and that the Board therefore declined, as a policy matter, to assert jurisdiction over certain labor disputes to which the Act applied on the ground that they were predominantly "local" in character. Yet Congress did not narrow the coverage of the Act to conform to the administrative limitations which the Board had imposed, or might in the future impose, on the exercise of its jurisdiction. Cf. p. 82, note 25, *infra*. On the contrary, it reenacted the jurisdictional language of the 1935 Act without change. See *National Labor Relations Board* v. *Denver Building & Construction Trades Council*, 341 U. S. 675, 684.

Adoption of the proviso to Section 10(a) of the amended Act reveals Congress' understanding that the national Act applies to labor disputes "affecting interstate commerce" which occur in industries "predominantly local in character"; the very industries over which, historically, the Board had declined for budgetary reasons to assert jurisdiction. Cf. Report of the Joint Committee on Labor Management Relations to the Second Session of the 80th Congress, quoted, p. 81, *infra*. The proviso contains a method by which the states may acquire jurisdiction to regulate labor disputes in these predominantly local industries. Such an enabling provision would obviously have been unnecessary if Congress had understood or intended that the Board's refusal to assert jurisdiction over "local" industries operated to remove such industries from the coverage of the Act. Removal of the Act would itself lift the bar of federal preemption to state jurisdiction. No statutory provision would have been necessary to revest the states with authority over an area to which federal law did not extend. Cf. note 22, pp. 38-39, *infra*.

The terms of the proviso would be meaningless and inoperative if the Board's mere declination to assert jurisdiction operated to restrict the Act's coverage. The proviso enables the Board to cede to the states its jurisdiction over "cases not predominantly national in character" (S. Min. Rep. No. 105 on S. 1126, p. 38, quoted at p. 64, *infra*). If the Board's refusal for administrative reasons to process such cases of itself terminated the Act's applicability, the Board would have no jurisdiction left to cede. Cession of jurisdiction to the states by agreement could then occur only in those areas in which the Board normally does not decline to assert its jurisdiction, *i. e.*, industries which are not "predominantly local in character". But in the proviso Congress expressly prohibited the Board under any circumstances from ceding jurisdiction over such labor disputes to the states.

The Board has recognized that although Congress permitted it to decline to assert its jurisdiction where budgetary or administrative considerations so required, Congress precluded the Board from divesting itself of jurisdiction except in accordance with the terms of the proviso. The Board's authority to decline to assert jurisdiction stems from the fact that Congress "empowered" rather than "directed" the Board to assert jurisdiction in any case within reach of the Act. *Haleston Drug Stores, Inc.* v. *National Labor Relations Board*, 187 F. 2d 418, 421 (C. A. 9). But to refrain from exercising power is not to terminate its existence. *National Labor Relations Board* v. *Dixie Terminal Co.*, 210 F. 2d 538, 540 (C. A. 6), cert. den. 347 U. S. 1015. As this Court said in *United States* v. *Morton Salt Co.*, 338 U. S. 632, 647-648:

> The fact that powers long have been unexercised well may call for close scrutiny as to whether they exist; but if granted, they are not lost by being allowed to lie dormant, any more than nonexistent powers can be

prescripted by an unchallenged exercise. We know that unquestioned powers are sometimes unexercised from lack of funds, motives of expediency, or the competition of more immediately important concerns. We find no basis for holding that any power ever granted to the Trade Commission has been forfeited by non-user."

Despite its "strong * * * desire for comity", the Board has held time and again that "it lacks power under the present statute to divest itself of jurisdiction, except in conformity with Section 10(a) of the amended Act." *Punch Press Repair Corp.*, 89 NLRB 614, 615; *Adams Motors, Inc.*, 80 NLRB 1518, 1519; *Kaiser-Frazer Parts Corp.*, 80 NLRB 1050, 1052. Absent a cession agreement, jurisdiction which the Board declines for administrative reasons to exercise does not pass to the states; it remains where Congress placed it—in the Board.

Moreover, since enactment of the Taft-Hartley Act in 1947, the Board has explicitly and consistently taken the position that the exclusiveness of its jurisdiction *vis-a-vis* the states is not altered or impaired by its refusal to entertain cases for budgetary or other administrative reasons. For example, in its Memorandum as *Amicus Curiae* in *Gilson Bros.* v. *Wisconsin Employment Relations Board*, No. 383, October Term, 1949, pp. 8-9, the Board said: "In authorizing the Board under certain circumstances to cede its jurisdiction to state agencies Congress made manifest its intention that, absent cession, the states were not to exercise jurisdiction as to matters covered by the National Act involving employers and employees who are subject to the National Act." In adopting the proviso "Congress acted on the premise that, absent specific authorization the states were entirely precluded from deciding cases or questions which the National Board was empowered to consider even though for budgetary reasons the National Board de-

clined to exercise its jurisdiction in a particular case." Brief for the National Labor Relations Board as *Amicus Curiae* in support of petition for rehearing in *United Automobile Workers* v. *Wisconsin Employment Relations Board*, Nos. 14 and 15, October Term, 1948, pp. 17-18, see also pp. 44-45; Brief for the National Labor Relations Board as *Amicus Curiae* in *Montgomery Building & Construction Trades Council* v. *Ledbetter Erection Co.*, No. 43, October Term, 1952, pp. 35-36. In its brief as *Amicus Curiae* in *Garner* v. *Teamsters Union*, No. 56, October Term, 1953, pp. 11-12, the Board said: "The proviso clearly indicates that with respect to conduct which the Board is authorized to remedy, no concurrent jurisdiction exists in the states except in strict conformity with the terms of the proviso". See also, pp. 35-40. In its brief as *Amicus Curiae* in *Amalgamated Clothing Workers* v. *Richman Brothers*, No. 173, October Term, 1954, p. 13, the Board said that Section 10(a) "specifies the limited circumstances under which the Board may grant the states authority to regulate in the pre-empted field."

Because no state has as yet brought its law, insofar as it regulates the labor relations matters with which the Act deals, into sufficient conformity with the national Act, the Board has found it impossible to cede jurisdiction to the states pursuant to the proviso. NLRB, *Thirteenth Annual Report* (Gov't Print. Off., 1949), p. 18; Report of the Joint Committee on Labor Management Relations, No. 986, Pt. 1, 80th Cong., 2nd Sess., p. 30, quoted, pp. 80-81, *infra*. Recognizing that the limitations which Congress imposed as conditions precedent to cession restrict the Board's power to vest jurisdiction in the states, the Board, as we have seen, has acknowledged that it cannot defeat those limitations by attributing to its mere administrative declination to process cases the effect of ceding jurisdiction to the states. The "National Board cannot do by abdication what it cannot

do by agreement." *New York State Labor Relations Board* v. *Wags Transportation System,* 130 N. Y. Supp. 2d 731, affirmed *per curiam,* 284 App. Div. 883, 134 N. Y. Supp. 2d 603.

C. States May Not Impair the Exercise of Rights Guaranteed by the Act, or Apply Policies Inconsistent With the Policies of the National Act, to Disputes Covered by the Act Over Which the Board Administratively Declines to Assert Jurisdiction.

Those who argue that the Board's administrative declination should be equated to total withdrawal of federal regulation of labor relations in the enterprises involved overlook the fact that Congress laid down "substantive rules" (*Garner* v. *Teamsters' Union,* 346 U. S. 485, 490) which it intended to govern the conduct of the parties to all labor disputes within the reach of federal power. "Congress formulated a code whereby it outlawed some aspects of labor activities and left others free for the operation of economic forces." *Weber* v. *Anheuser-Busch, Inc.,* 348 U. S. 468, 480. It is the national Act itself, not the Board, which creates the rights and imposes the obligations which bind employers, employees and labor organizations. In this, as in other statutes which establish rules of conduct, Congress presupposed that its rules would be observed by most law abiding citizens without resort to sanctions for enforcement.

That Congress vested in the Board, rather than in courts generally, exclusive primary jurisdiction to construe, apply and enforce its rules "carries implications of exclusiveness" (*Weber* v. *Anheuser-Busch, Inc.,* 348 U. S. 468, 476), which normally preclude the states from enforcing even identical rules of their own. *Plankinton Packing Co.* v. *Wisconsin Employment Relations Board,* 338 U. S. 953; *International Union, etc.* v. *O'Brien,* 339 U. S. 454, 456, 457.

The legislative history of both the Wagner and the Taft-Hartley Acts shows that Congress chose to centralize administration for the purpose of achieving uniform interpretation of its rules throughout the Nation. S. Rep. No. 573, 74th Cong., 1st Sess., p. 9; H. R. 3020, p. 40. As this Court pointed out in *Bethlehem Steel Corp.* v. *New York State Labor Relations Board,* 330 U. S. 767, 773, "the mere fact of delegation of power to deal with the general matter, without agency action, might preclude any state action if it is clear that Congress has intended no regulation except its own." Cf. *Rice* v. *Santa Fe Elevator Corp.,* 331 U. S. 218, 236. The 1947 Act, in which Congress not only retained exclusive primary jurisdiction in the Board but established conditions pursuant to which the states can acquire jurisdiction to regulate labor problems in local industries under state laws, shows that Congress intended its regulatory scheme to be exclusive. See pp. 69-83, *infra.* The Taft-Hartley Act makes it "clear" that, except as the states may acquire jurisdiction pursuant to the Section 10(a) proviso, "Congress occupied this field and closed it to state regulation." *Amalgamated Ass'n., etc.* v. *Wisconsin Employment Relations Board,* 340 U. S. 383, 390.

Even putting aside, *arguendo,* the evidence that Congress intended its regulatory scheme to be exclusive, the Board's declination for administrative reasons to entertain a case of alleged violation could, at most, leave the states free to invoke and enforce only rules consistent with those which Congress enacted. The Board's declination could not empower the state to relieve the parties of their obligations under federal law, or authorize application to them of rules conflicting with the federal. Preemption aside, "Obvious conflict, actual or potential, leads to easy judicial exclusion of state action." *Weber* v. *Anheuser-Busch, Inc.,* 348 U. S. at 480.

That unavailability of the Board's processes to remedy a violation does not eliminate the national Act so as to authorize application of inconsistent state policies was decided by this Court last term in *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U. S. 62, 74:

> Such elimination of the Board does not, however, eliminate the applicability of the National Labor Relations Act, as amended, and does not settle the issue as to the right of the state court to enjoin the employees and their union from peacefully picketing the employer's plant for the purpose of securing recognition.
>
> The industrial relations between the company and its employees nonetheless affect interstate commerce and come within the field occupied by the National Labor Relations Act, as amended. The Labor Board is but an agency through which Congress has authorized certain industrial relations to be supervised and enforced. The Act goes further. The instant employer, employees and union are controlled by its applicable provisions and all courts, state as well as federal, are bound by them.

In the *Arkansas Oak Flooring* case, it was held that the rights conferred by Section 7 of the Act remained effective and intact even though the labor organization involved refused to comply with Section 9(h) of the Act, and the Board was therefore barred by the provisions of the Act itself from according a remedy to the union for violation of those rights. Surely, the Board's voluntary withdrawal for "budgetary or other reasons best known to the NLRB" (*Retail Clerks Local No. 1564* v. *Your Food Stores*, 225 F. 2d 659, 662 (C. A. 10)), does not have a more drastic impact on the rights which the statute guarantees than does withdrawal necessitated by Congress' judgment that effectuation of important national interests requires it.

Congress relied only in part on the Board to enforce national labor policy in the areas covered by the Act. Al-

though the rights guaranteed in Section 7 are conferred "generally on employees and not merely as against the employer", Congress authorized the Board to impose "sanctions on the employer alone". *Hill* v. *Florida*, 325 U. S. 538, 545. This Court "has ruled that a State may not prohibit the exercise of rights which the federal Acts protect". *Weber* v. *Anheuser-Busch Inc.*, 348 U. S. 468, 474; *International Union etc.*, v. *O'Brien*, 339 U. S. 454; *Amalgamated Association etc.*, v. *Wisconsin Board*, 340 U. S. 383; *Thomas* v. *Collins*, 323 U. S. 516, 542; *Arkansas Oak Flooring* case, *supra*. The states do not acquire authority to prohibit the exercise of rights which the Act protects merely because the Board declines, for reasons grounded in its own budgetary and other administrative considerations, to protect them against employer invasion. Protection of those rights against state intrusion is established by the statute and is effectuated independently of the Board. Since protection does not depend upon the Board's exercise of its powers, the Board's declination to act cannot impair the rights.

Many other aspects of the national labor policy which Congress embodied in the Act do not depend upon the Board's exercise of its powers for their implementation. For example, in Section 14(a) Congress provided that although "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization", nevertheless, "no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."[22] If the Board's declination were treated as

[22] The proviso to Section 14(a) shows that Congress understood that by removing supervisors from the category of employees it was exempting relations between employers and supervisors from the coverage of the Act and hence from the "field" which the federal Act occupies. Congress knew that, having left in this

the equivalent of withdrawal of the Act's coverage from employers over whom the Board refused to assert its jurisdiction, the states would be free to apply to such employers local laws compelling bargaining with supervisors. Such a result obviously would conflict squarely with Congress' determination that such state laws shall not apply to any employer who is reached by Congress' power under the Commerce Clause.

In Section 303 of the Labor Management Relations Act, Congress made it "unlawful" for labor organizations "in an industry or activity affecting commerce" to engage in the conduct which Section 8(b)(4) of the national Act prohibits as an unfair labor practice. In Section 303 Congress gave parties injured by such conduct the right to sue for damages only in any court of appropriate jurisdiction, state or federal. If the Board's jurisdictional policy standards were regarded as an effective declaration that the national Act is inapplicable to employers over whom the Board declines to assert jurisdiction, such employers would be left without the remedy in damages which Congress gave them, and totally without remedy in those states which do not regard as illegal conduct which Section 8(b)(4) and Section 303 outlaw.[23]

Similarly, Congress' authorization of suits in the federal courts for "violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act" (Section 301), and its outlawry of payments to "any representative" of

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portion of the field which it left unoccupied, the states would be free to apply their own policies unless Congress indicated that it intended to prohibit state regulation. Accordingly, it incorporated such a prohibition in Section 14(a) to make it clear that it was indifferent to "no law" policy on the merits, and not because it desired to leave the issue. See p. 64, *infra*; *cf. Utah Labor Relations Board* v. *Utah Valley Hospital*, .. Utah .., 235 P. 2d 520.

[23] Restatement of Torts, Vol. IV, Sections 802-804.

"employees who are employed in an industry affecting commerce" (Section 302), in no wise depend for their applicability upon the Board's discretionary determination to assert or not assert the jurisdiction which the Act confers upon it.

It is because the federal Act itself imposes the operative regulation that even under the Wagner Act, before Congress adopted the proviso to Section 10(a), the Government recognized that the Board's declination to process unfair labor practice cases for budgetary reasons could not be equated to the failure of an administrative agency to adopt regulations concerning a matter which Congress empowered the agency to regulate. See Brief for the United States as *Amicus Curiae* in *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, No. 55, Oct. Term, 1946, pp. 36-37. In the latter cases, "where effective regulation must wait upon the issuance of rules by an administrative body • • • this Court has usually held that the police power of the state may be exercised." *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U. S. 767, 773-774. But state power survives in those cases only because until the agency acts there is no federal rule with which state rules or policies can conflict. Where, as here, there is potential conflict between federal rules and inconsistent state rules and policies supersedure of state power is required at least to the extent that the states might apply rules or policies inconsistent with the federal Act.

Of course, where the national Board does not decline to exercise its jurisdiction, state power must be precluded even though the state seeks to apply policies and procedures identical with the federal. For even if the rules and policies are the same the two agencies, state and federal, each exercising discretion, "might come out with • • • conflict-

ing" determinations.[24] "The second to act either must follow the first, which would make its action useless and vain, or depart from it, which would produce a mischievous conflict." *Bethlehem* case, *supra*, 330 U. S. 767, 775, 776; *LaCrosse Telephone Corp.* v. *Wisconsin Employment Relations Board*, 336 U. S. 18, 26. The Board's declination, for as long as it continues, eliminates the danger that state action in the dispute would be "useless or vain." But it does not eliminate the danger that the state may apply to the dispute rules, policies or procedures inconsistent with the federal.

Recognizing this, the Government in its brief in the *Bethlehem* case, No. 55, Oct. Term, 1946, p. 69, said: "In this field in which the national Board can but does not take jurisdiction, it is obviously more consonant with the policy of the National Statute to permit enforcement of state laws embodying the same policy than to leave the employees' rights without any statutory protection. This justifies excepting this field from the otherwise exclusive grant of authority to the Board in Section 10(a)." Such an exception would have meant, of course, that state laws embodying policies inconsistent with the national Act could not be applied in this area. If this Court had adopted the theory thus urged by the Government, and if Congress had not, in the 1947 amendments, dealt with the question, issues might have arisen in each case in which a state attempted to apply its own law to a dispute over which the Board declined to assert jurisdiction whether the state law was consistent or inconsistent with the national Act. We illustrate the nature of the problems which such a rule would have presented in the next section of this brief. In the following section we demonstrate that Congress, inferring

[24] Cf. Brief for the United States in *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, No. 55, Oct. Term, 1946, p. 53: "Even when the statutes and administrative policies are the same, cases may be decided differently."

from the decision of this Court in the *Bethlehem* case that no state laws, even entirely consistent ones, could be applied in the areas over which the Board declined jurisdiction for budgetary or other administrative reasons, drafted the proviso of Section 10(a) to enable the states to assert jurisdiction in this limited area, but only upon delegation from the Board, thereby assuring that only consistent state laws would apply.

II.

OHIO LAW GOVERNING LABOR DISPUTES, AS APPLIED IN THIS CASE, IS INCONSISTENT WITH THE NATIONAL ACT.

The Court of Appeals held that the picketing was unlawful because (R. 165) its purpose was "to compel Fairlawn Meats to compel its employees to join a union contrary to their already expressed wishes." This, said the court, brought it into conflict with the public policy of Ohio (R. 164): "that employers may not be picketed for the purpose of coercing their employees to join a union." Purporting to demonstrate that Ohio's labor policy parallels federal policy, the court declared (R. 165) that, because of its purpose, the picketing would be an "unfair labor practice" under the national Act.

Analysis demonstrates, however, that Ohio's policy, as applied to the facts of this case, is in sharp conflict with Congress' policies.

A. The Courts Below Entirely Overlooked Fairlawn's Unfair Labor Practices Which Federal Law Condemns.

The evidence shows that when Ekers determined to break off negotiations and terminate relations with the Union, he embarked upon a course of conduct destructive of his employees' freedom of self-organization. Ekers

told fifteen "key" employees that he did not want them to join the Union and threatened them with the loss of overtime and Sunday work if he were forced to sign a Union contract (pp. 4-5, *supra*). Admittedly, after the strike began, Fairlawn's store managers, on company time and property, circulated and induced employees to sign petitions repudiating the Union and supporting management's position in the dispute (*supra*, p. 5). It was also admitted that Fairlawn solicited and obtained job resignations from several employees, suggesting that they should regard membership and activity in the Union as incompatible with employment at Fairlawn (*supra*, p. 5). The Court of Appeals concluded, nevertheless, that Fairlawn's employees "could join or not join [the Union], so far as management was concerned" (R. 159).

Under the National Labor Relations Act, as construed by the national Board and the federal courts, Fairlawn's conduct which the courts below thus sanctioned, constituted flagrant employer unfair labor practices. To instruct employees not to join a union and threaten them with loss of work opportunities if the employer does not succeed in thwarting consummation of a union contract is the very coercion of employees which Section 8(a)(1) condemns. The circulation of anti-union petitions among employees on company time and property by the employer's responsible supervisors is a classic unfair labor practice.[25] The Board and the federal courts recognize that

[25] *Red Rock Company*, 84 NLRB 521, 524-525, enforced, 187 F. 2d 76 (C. A. 5), cert. denied, 341 U. S. 950; *Royal Palm Ice Co.*, 92 NLRB, 1295, 1296, 1310, enforced, 193 F. 2d 569 (C. A. 5); *National Labor Relations Board* v. *United Biscuit Co.*, 208 F. 2d 52, 55 (C. A. 8); *F. W. Woolworth Co.* v. *National Labor Relations Board*, 121 F. 2d 658, 661 (C. A. 2), enforcing 25 NLRB 1362, 1371; *Ward Body Works, Inc.*, 103 NLRB 680, 682; *Northern Crate & Lumber Co.*, 105 NLRB 218, 221; *Continental Desk Co.*, 104 NLRB 912, 913, 916; *Consolidated Machine Tool Corp.*, 67 NLRB 737, 738, 739; *Gagnon Plating & Mfg. Co.*, 103 NLRB

the mere handing of such petitions to employees by supervisors on company time and property is "tantamount to compulsion to sign them," and that the intimidatory effect is not vitiated even if employees are ostensibly left free not to sign and even if the employees later testify that they signed of their own volition and were not coerced into doing so. *Red Rock Company,* 84 NLRB 521, 524, 525. See also cases cited note 25, *supra;* cf., *National Labor Relations Board* v. *Donnelley Garment Co.,* 330 U. S. 219, 230, 231. Here the employees themselves recognized that they were coerced into signing (R. 134, 136, 138). Fairlawn's action in inducing Union sympathizers to sign statements of resignation would similarly be regarded under the national Act as illegal intimidation (R. 89). The resignations resulting therefrom would have been deemed "constructive discharges" rather than voluntary terminations of employment.[26]

263, 268. See also, *Advance Stamping Co.* v. *Local 267, UAW,* decided June 18, 1956 (Cir. Ct., Livingston County, Mich.), 38 LRRM 2382, 2386-2387, 2398-2399, holding that an employer's act in circulating among employees for signature a petition calling for an NLRB election is interference, coercion and intimidation, violative of the "employees' right to self organization" and an "unfair labor practice" under the national Act.

[26] *Marathon Electric Mfg. Corp.,* 106 NLRB 1171, 1173, 1175, 1199; *East Texas Motor Freight Lines,* 47 NLRB 1023, 1029, aff'd. 140 F. 2d 404 (C. A. 5); *Bausch & Lomb Optical Co.,* 107 NLRB 790, aff'd., 217 F. 2d 575 (C. A. 2).

B. Being the Fruit of Fairlawn's Unfair Labor Practices, the Evidence on Which the Ohio Courts Relied to Establish the Union's Lack of Majority Support Among the Employees Would Not Be Deemed Probative or Even Admissible for That Purpose Under the Policies of the National Act.

To establish that a majority of the employees did not desire to be represented by the Union, the courts below relied upon the petition which 41 out of 50 employees had signed at Fairlawn's instance on February 10, 1954, and upon the resignation of Union adherents from employment (R. 151, 159, 163, 165). As we have seen, the national Board and the federal courts would hold that both the petition and the resignations reflected intimidation by Fairlawn, not the uncoerced desires and acts of the employees. Accordingly, they would not permit the employer even to adduce such evidence to establish the union's lack of majority status. See cases cited note 25 *supra*. On May 10, 1952, when Fairlawn initially recognized the Union, it apparently did not even challenge the Union's majority, and no evidence was adduced to rebut the normal presumption that that agreement when made, was lawful.[27] The normal presumption that the Union's majority status continued would not have been deemed rebutted by the evidence of defections which Fairlawn induced by its unfair labor practices. As this Court said in *Medo Photo Corp.* v. *National Labor Relations Board*, 321 U. S. 678, 687, an employer "cannot, as justification for its refusal to bargain with the union, set up the defection of union members which it had in-

[27] The record does not even show how many employees there were in the bargaining unit on that date. The number, 50, represents Fairlawn's payroll as of February, 1954; it does not show what changes may have taken place in the size of the unit in the interval.

duced by unfair labor practices even though the result was that the union no longer had the support of a majority. * * * [The employer's] refusal to bargain under those circumstances was but an aggravation of its unfair labor practice in destroying the majority's support of the union, and was a violation of § 8(a) (1) and (5) of the Act." Cf. *National Labor Relations Board* v. *Warren Co.*, 350 U. S. 107.

The conflict between the national Act's policy and Ohio's treatment of employer induced repudiation of a labor organization is highlighted by the decision of the Court of Appeals below in *Anderson* v. *Retail Clerks' Union*, decided May 23, 1956 (Ohio Ct. App., Ninth Judicial District, per Hunsicker, J.), 38 LRRM 2324, the facts of which the court considered "similar" to the instant case, and to which it applied the same rule. 38 LRRM at 2325, 2326. In the *Anderson* case, the opinion recites, the Union was admittedly the recognized exclusive bargaining agent of the grocery department employees. Prior to the expiration of its collective bargaining contract with the store, the employer "told the employees * * * that [he] did not wish to have a union store. * * * he asked each of such employees individually, if he or she desired to leave the union, to sign a paper writing indicating he or she wished to withdraw from the union. Six members of the grocery department signed this paper, and three refused to sign." The employer thereafter refused to bargain with the Union. The court held that these signatures evidenced the desire of "the majority of the employees * * * that no union represent them in their dealings with the employer," and that, in consequence, the union had lost its status as bargaining agent of the employees of the store, and the employer was justified in refusing to bargain further with the union (38 LRRM at 2326).

If the principles of the national Act had been applied

in the *Anderson* case, the employer would have been ordered both to cease and desist from illegal interference and to bargain with the Union. Moreover, the Union's picketing for recognition after the employer refused to bargain would have been held protected by Section 7.[28] Under Ohio law, not only was the employer's illegal interference excused, and no obligation imposed upon him to bargain, but the Union was enjoined from picketing.

Similarly, if the principles of the national Act, rather than Ohio law, had been applied in the instant case, at minimum, Fairlawn would have been found guilty of unfair labor practices and would have been ordered to cease and desist from its illegal interference. If Fairlawn had charged before the Board, as it alleged in the state courts, that the Union's strike and picketing was designed to force Fairlawn to enter into a union-shop contract, the General Counsel might well have refused to issue a complaint. For the strike resulted from Fairlawn's total refusal to negotiate further with the Union and from its unfair labor practices, not from mere rejection of a union-shop proposal. There was no evidence that a strike would have occurred at all if Fairlawn had offered to sign a contract without a union-shop clause, or even if Fairlawn had been willing to continue negotiations with the Union. (See R. 123). Cf. *Medford Building and Construction Trades Council*, 96 NLRB 165, 166.

Moreover, even if it be assumed that one of the Union's objectives was to obtain a union-shop contract, Fairlawn presented no admissible evidence that the circumstances

[28] Under the national Act, strikes and picketing in protest against employer unfair labor practices are clearly protected by Section 7. *Mastro Plastics Corp.* v. *National Labor Relations Board*, 350 U. S. 270. Congress rejected the provision of the House bill (Section 12 (a)(13)(c)(ii)), which would have outlawed concerted activities to remedy conduct for which the Act provided an administrative remedy, p. 49, *infra*.

were such as to make such a demand illegal. Since a union-shop demand is illegal under the national Act only if the Union lacks a majority, the Board holds that the burden of proving lack of majority rests with the charging party; the Union need not come forward with evidence to establish its majority status until a *prima facie* case has been made out against it. *International Metal Products Company*, 104 NLRB 1076, 1078. For the reasons already stated, the evidence offered by Fairlawn to establish the Union's lack of majority would not have served, under the national Act, to establish even a *prima facie* case.

On the contrary, the General Counsel might have regarded Fairlawn's refusal to continue negotiations as sufficient under the circumstances to warrant issuance of a complaint charging Fairlawn with illegally refusing to bargain. Even if the presumption of continuing majority were not considered adequate to establish the Union's majority prior to February 11, 1954, the General Counsel might have considered sufficient the affirmative evidence which the Union offered to show that after the strike began it represented 26 of Fairlawn's employees (R. 188A).

C. Ohio Law Outlaws Peaceful Strikes and Picketing for Organizational and Recognition Purposes Which Federal Law Sanctions.

If, however, the national Board had found, as did the courts below, that the Union did not have a majority and that the object of the strike and picketing was to cause Fairlawn to enter into a union-shop contract, it would have entered a different and far narrower order than did the courts below. On those findings the Board would have held the Union's conduct violative of Section 8(b)(2) of the Act, which prohibits a labor organization from causing or attempting to cause an employer to discriminate

against an employee in violation" of Section 8(a)(3). *Denver Building and Construction Trades Council* (*Henry Shore*), 90 NLRB 1768, 1770; *Medford Building and Construction Trades Council*, 96 NLRB 165; cf. *Garner* v. *Teamsters' Union*, 346 U. S. 485. The Board would have carefully limited its order so as to enjoin "only picketing engaged in, to compel the employer to discriminate against employees in violation of Section 8(a)(3) of the Act", deliberately leaving the Union free to picket for "other purposes". *Denver* case, *supra*, 90 NLRB at 1770.

The reason for, and the importance of such limitation is clear. In adopting the Taft-Hartley Act, Congress decided that even stranger picketing for organizational purposes should not be made illegal, and that strikes and picketing for recognition should be made illegal only if they occur after another labor organization has been certified as exclusive bargaining agent of the unit involved. Section 12(a)(2) of the House bill, (H. R. 3020, 80th Cong., 1st Sess.), would have outlawed:

> Picketing an employer's premises for the purpose of leading persons to believe that there exists a labor dispute involving such employer, in any case in which the employees are not involved in a labor dispute with their employer.

Section 12(a)(3)(C) would have made it illegal for a labor organization to call or engage in "any strike or other concerted interference with an employer's operations, an object of which is (i) to compel an employer to recognize for collective bargaining a representative not certified under Section 9 as the representative of the employees, or (ii) to remedy practices for which an administrative remedy is available under this Act, or (iii) to compel an employer to violate any law or any regulation, order or direction issued pursuant to any law."

The minority report objected to these provisions on

the ground that they would "wholly destroy labor's right to strike as an organizational weapon" (H. Minority Rep. No. 245 on H. R. 3020, p. 66). The Senate bill contained no comparable provisions and these provisions of the House bill were rejected in conference. The only limitation imposed by the Act as finally adopted upon organizational and recognition strikes and peaceful picketing was contained in Section 8(b)(4)(C). The Report of the House Committee states that "the primary strike for recognition (without a Board certification) was not prohibited." H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 43; S. Rep. No. 105 on S. 1126, 80th Cong. 1st Sess., p. 22; Report of the Joint Committee on Labor-Management Relations, No. 986, Pt. 3, 80th Cong., 2d Sess., p. 71, quoted in *United Mine Workers of America* v. *Arkansas Oak Flooring Company*, 351 U. S. 62, p. 75, note 14.

Fear that it might open the door to illegalization of "the right to strike for recognition purposes" (93 Cong. Rec. 4840, in 2 Leg. Hist. L. M. R. A. 1359), was one of the factors which led to rejection by the Senate of the Ball amendment, which would have authorized private parties to bring suit in the federal courts for injunctive relief. 93 Cong. Rec. 4757, 4847, in 2 Leg. Hist. L. M. R. A. 1323, 1370. Senator Morse, one of the leading opponents of the Ball amendment, pointed out that preservation of the right to strike for recognition, in the absence of a rival certification, was necessary to permit employees to protect themselves against unfair labor practices and other "provocative action" by their employer, which may and frequently does take place "when a union has just begun its organizing efforts", prior to achieving majority status. He observed that to deny the right to strike for recognition until the union had gained a majority, or until it had been certified by the Board, would "award a bonus to those employers who engage in the most outrageous anti-social con-

duct". 93 Cong. Rec. 4840-4841, in 2 Leg. Hist., L. M. R. A. 1359-1360.

Section 8(b)(1) which makes it an unfair labor practice for a labor organization or its agents "to restrain or coerce (A) employees in the exercise of rights guaranteed in section 7", does not outlaw peaceful strikes and picketing whether by minorities or majorities. That Section was added to the Senate bill by amendment on the floor. 93 Cong. Rec. 4442, in 2 Leg. Hist. L. M. R. A. 1217, Supplemental Statement of Senators Ball, Taft, Donnell, Jenner and Smith, S. Rep. No. 105, 80th Cong. 1st Sess., p. 50. Its purpose was to prohibit the use of force and violence, mass picketing and similar conduct, tortious *per se*, which had been outlawed in Section 12(a)(1) of the House bill. *National Maritime Union of America*, 78 NLRB 971, 982, *et seq.* Senator Morse opposed the provision which became Section 8(b)(1)(A) (93 Cong. Rec. 4431 in 2 Leg. Hist. L. M. R. A. 1197-1198) on the ground that "it will have the effect of outlawing organizational strikes and strikes for recognition. In fact, it could easily be construed to prohibit all types of strike in situations where some of the employees are opposed to the strike." After quoting from p. 22 of the report of the Senate Committee, cited p. 50, *supra*, Senator Morse continued:

> Thus the committee did not intend to outlaw all types of primary strikes; in fact, it was careful to point out that organizational strikes were not prohibited, because sometimes they are justified.
>
> Since it has frequently been held that strikes are a form of coercion, it follows, Mr. President, that the pending amendment would outlaw all strikes designed to further organizational activities. While I am of the opinion that unions should utilize the election machinery of the act wherever possible, rather than resort to strike action in an attempt to solidify organization, it must be recognized that organizational strikes have a legitimate place in some situations.

Senator Taft, one of the sponsors of the amendment, took the floor specifically to deny that Section 8(b)(1)(A) was intended to or would affect peaceful strikes or peaceful picketing. 93 Cong. Rec. 4436-4437, in 2 Leg. Hist. L.M.R.A. p. 1207. He said:

> The Senator says it will slow up organizational drives. It will slow up organizational drives only if they are accompanied by threats and coercion. The cease-and-desist order will be directed against the use of threats and coercion. It will not be directed against the use of propaganda or the use of persuasion, or against the use of any of the other peaceful methods of organizing employees.
>
> Mr. President, I can see nothing in the pending measure which, as suggested by the Senator from Oregon, would in some way outlaw strikes. It would outlaw threats against employees. It would not outlaw anybody striking who wanted to strike. It would not prevent anyone using the strike in a legitimate way, conducting peaceful picketing, or employing persuasion. All it would do would be to outlaw such restraint and coercion as would prevent people from going to work if they wished to go to work.

In view of this legislative history, the national Board holds that Section 8(b)(1)(A) does not outlaw minority strikes for recognition (*National Maritime Union of America*, 78 NLRB 971, 986), or organizational picketing by non-employees (*Painters District Council No. 6*, 97 NLRB 654, 655, 666-668; stranger picketing to induce employees to withdraw decertification petition). See also *Perry Norvell Company*, 80 NLRB 225, 238-240.[29]

The opinion of the Court of Appeals below shows that

[29] The Board recognizes, of course, that if the objective of the strike or picketing is independently unlawful, participation therein, may, absent mitigating circumstances, warrant denying to employees the "protection" of the Act, i. e., protection through reinstatement with back pay against employer discharge for such participation. See *Perry Norvell Co.*, 80 NLRB at 241.

it assumed that under the national Act a labor organization could lawfully strike and picket for the purpose of obtaining recognition only after it had been chosen as bargaining agent by a majority of the employees in an election conducted by the Board (R. 164). It assumed that until it had been chosen by a majority, a labor organization could not lawfully strike or picket at all. These assumptions, as we have seen, are quite false. See also, *Amalgamated Meat Cutters, etc.* v. *Johnson*, 178 Kan. 405, 286 P. 2d 182; cf. *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U. S. 62, 72, note 8. As the Report of the Joint Committee on Labor Management Relations put it (80th Cong., 2nd Sess., pp. 70-71):

> A labor organization may lose an election in which it was the only union on the ballot and the next day call a legal strike to force the employer to recognize it as the bargaining agent for those employees who have just rejected it.

The opinion in this case (R. 163), and the opinion of the same court in *Anderson* v. *Retail Clerks Union*, 38 LRRM 2324, 2326, which quotes and relies upon the instant opinion, also show that Ohio treats as coercive and illegal peaceful picketing designed to induce employees to join a labor organization. Thus Ohio has adopted the very policy on peaceful organizational picketing which Congress rejected. And the legislative history shows that Congress rejected that policy "on the merits" (*International Union, etc.* v. *O'Brien*, 339 U. S. 454, 458, note 5), "as being inconsistent with its policy in respect to enterprises covered by the Federal Act, and not because of any desire to leave the states free to adopt it." *Amalgamated Association, etc.* v. *Wisconsin Employment Relations Board*, 340 U. S. 383, 394-395.

In addition, although acknowledging that the Union had at all times acted in the good faith belief that its activi-

ties to aid unionization were entirely lawful (R. 155), the trial court invoked the conspiracy doctrine to hold the Union's conduct illegal. This Court has expressly held that: "Section 7 of the Labor Relations Act took this conspiracy weapon away from the employer in employment relations which affect interstate commerce." *International Union U. A. W.* v. *Wisconsin Employment Relations Board,* 336 U. S. 245, 257-258.

Both courts below found that the strike and picketing herein did not arise out of a "labor dispute" (R. 151-155, 161-165) by defining that phrase far more narrowly than Congress defined it in the Act. Section 2 (9); see also p. 49, *supra.*

Finally, the courts below characterized as a "secondary boycott" the direct inducement of other employers to cease doing business with Fairlawn (R. 155-156, 165). Under the national Act, Congress prohibited as secondary boycotts only union inducement of employees of neutral employers to strike against their employer; it left unions free to induce secondary employers to cease doing business with the primary employer by all other means. *Schatte* v. *International Alliance, etc.,* 182 F. 2d 158, 165 (C. A. 9), cert. denied, 340 U. S. 827; *Rabouin* v. *National Labor Relations Board,* 195 F. 2d 906, 911 (C. A. 2); *Sealright Pacific, Ltd.,* 82 NLRB 271; *Ferro-Co Corp.,* 102 NLRB 1660. Thus, the conduct of petitioner and its allies in this case with relation to Fairlawn's suppliers, which Ohio's policy condemns, is permissible under the national Act's policy.

Pursuant to Ohio's inconsistent policies, the courts below entered a decree which prohibits the union from engaging in any and all peaceful picketing, an order far more restrictive than the Board could or would have issued even if it had made identical findings as to the purpose

of the picketing, pp. 48-49, *supra*. As this Court held in *Garner* v. *Teamster's Union*, 346 U. S. 485, 500:

> For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits.[30]

D. Ohio's Policy of Permitting Employers to Resort Directly to the Courts for Injunctive Relief Against Peaceful Strikes and Picketing Conflicts With Congress' Determination That Private Parties Should be Barred from Direct Resort to the Courts for Injunctive Relief in Such Cases.

One of the most important policy questions which Congress decided when it enacted the Taft-Hartley Act was whether employers should be authorized to apply to the courts directly for injunctive relief against strikes and peaceful picketing for objectives which the Act defined as unfair labor practices. A minority of the Senate Committee, led by Senator Ball, proposed to permit employers to bring suit in the federal courts to enjoin secondary boycotts and jurisdictional strikes. S. Rep. No. 105, 80th Cong., 1st Sess., pp. 54-56. They urged that to limit employers to recourse to the Board would provide only a "weak and uncertain remedy for those injured by clearly illegal strikes." The proponents pointed out that relief would depend "upon the decision of the National Labor Relations Board as to whether any action shall be taken;" and that employers acting on their own initiative could obtain faster relief than the Board could make available.

[30] We shall demonstrate in Point IV, below, that the fact that at two of the stores the picketing proceeded on the employer's property and was viewed by the courts below as a trespass cannot justify Ohio's invasion of rights which Sections 7 and 13 of the Act guarantee.

They also contended that injunctions against illegal purpose strikes would not involve "continuous supervision and contempt charges" but would be "completely effective". In addition, they urged that persons wronged by illegal strikes should, as a matter of principle, be accorded the right to seek their own remedy and control their own litigation in the courts. 93 Cong. Rec. 4837, 2 Leg. Hist. L. M. R. A., 1353.

Opposition to the proposal proved overwhelming. A majority of the Senate Committee voted it down (93 Cong. Rec. 4131, 2 Leg. Hist., L. M. R. A. 1054). Senator after Senator took the floor to warn that to permit employers to apply to the courts for injunctive relief against peaceful strikes and picketing would reintroduce "the flagrant abuses which brought about the enactment of the Norris-LaGuardia Act" (Senator Ives, 93 Cong. Rec. 4839, 2 Leg. Hist. L. M. R. A., 1356). Senator Ellender opposed the amendment on the ground that "the injunctive process was resorted to by employers in thwarting strikes and in denying the right of labor to organize". 93 Cong. Rec. 4131, 4132, 2 Leg. Hist. L. M. R. A. 1054. See also statements of Senators Thomas and Murray, 93 Cong. Rec. 4757-4770, 4845-4846, 2 Leg. Hist. L. M. R. A., 1324-1346, 1368. Senator Ellender also argued that Congress should not be overly concerned with the efficacy of the remedy because (93 Cong. Rec. 4838, 2 Leg. Hist., L. M. R. A. 1356): "the fact that we make jurisdictional strikes and secondary boycotts unfair labor practices will act as a deterrent and few violations will come to the attention of the Board." It was pointed out, too, that one of the major objects of the bill was to equalize the rights of employers and employees acting through labor organizations, and that it would be unjust to permit employers to resort to the courts for injunctive relief against union unfair practices if employees were denied the privilege of

obtaining relief through the courts against employer unfair practices. 93 Cong. Rec. 4838, 4845-4846, 2 Leg. Hist. L. M. R. A. 1355, 1368. Senator Morse observed that labor problems are highly complex and that continuous attention is necessary to achieve the expertness necessary to deal adequately with them. Judges, he said, had not "the desire, or the time," to acquire the special competence the field required. (93 Cong. Rec. 4841-4842, 2 Leg. Hist. L. M. R. A. 1360-1361.) Senator Smith stated (93 Cong. Rec. 4843, 2 Leg. Hist. L. M. R. A. 1364) that Congress was seeking "to improve the relations between management and labor, and not to raise new barriers through the feeling brought about by lawsuits." He continued:

> I do not believe that the way to deal with this problem in the first instance is by seeking injunctions. I believe that the problem should be handled by the Board, which is distinctly charged with the responsibility of being a judicial board to take care of problems on both sides of the controversy. I think we are justified in experimenting with that procedure before we go back to all the old legal remedies, including especially the injunctive remedy, which caused so much trouble in the early labor cases.
>
> I admit that secondary boycotts and jurisdictional strikes are indefensible; but questions will arise with respect to which discretion may be needed, and I believe that the Board can serve a very useful function, even in cases of secondary boycotts and jurisdictional strikes.

For all of these reasons, Congress rejected the "court approach" in favor of the "administrative law approach." 93 Cong. Rec. 4132, 2 Leg. Hist., L. M. R. A. 1057; 93 Cong. Rec. 4847, 2 Leg. Hist., L. M. R. A. 1369. It decided that injunctive relief against unlawful purpose strikes and picketing should be made available only through "the Board, acting in the public interest and not

in vindication of purely private rights." S. Rep. No. 105 or S. 1126, p. 8. "In such cases the injunction can be obtained only through the National Labor Relations Board." 93 Cong. Rec. 6446, 2 Leg. Hist. L. M. R. A. 1544.

Impressed that "opposition to restoring the injunctive process even in cases of secondary boycotts and jurisdictional disputes, seemed to be so strong," Senator Taft offered a substitute amendment to permit employers to sue only for damages when injured by conduct characterized as union unfair labor practices by Section 8(b)(4). 93 Cong. Rec. 4843-4844, 2 Leg. Hist. L. M. R. A. 1365. This would, he urged, be "a powerful deterrent" to such conduct (*Ibid.*). Only after Senator Taft had assured the Senate that this provision would not open the door to employers to obtain injunctive relief was the amendment, Section 303 of the Act, adopted. 93 Cong. Rec. 4872-4874, 2 Leg. Hist. L. M. R. A. 1396-1400. See *Amazon Cotton Mill Co.* v. *Textile Workers Union*, 167 F. 2d 183, 188-189 (C. A. 4).

By permitting employers to resort directly to its courts to obtain injunctive relief against strikes and peaceful picketing Ohio has adopted the very policy which Congress rejected as being incompatible with its program of improving "relations between management and labor" in industries subject to the national Act, p. 57, *supra*. Congress prohibited employers from resorting to the injunctive process for fear that the process would be used in "thwarting strikes and in denying the right of labor to organize," p. 56, *supra*. In adopting the "court approach", Ohio ignores its inherent dangers to federally protected rights, dangers which Congress deemed decisive against it.

Congress thought it essential, in order to deal fairly with

labor disputes affecting commerce, that an administrative agency which could impartially investigate "both sides of the controversy", p. 57, *supra*, and would act to vindicate only public, not private, rights, stand between the employer and injunctive relief through the courts. The legislative history shows that Congress believed, as this Court recently observed, that "Orders which originate in state boards and become effective through the state judiciary should give more careful protection to the rights of labor than the purely judicial orders of a court." *United Automobile Workers, etc.* v. *Wisconsin Employment Relations Board and Kohler Co.*, 351 U. S. 266, 274. The policy of any state which adopts the "court approach" to the handling of matters in the field covered by the Act is by that token alone inconsistent with the national Act.

III.

THE TERMS AND THE LEGISLATIVE HISTORY OF THE PROVISO TO SECTION 10(a) SHOW THAT THE STATES MAY ACQUIRE JURISDICTION TO REGULATE UNFAIR LABOR PRACTICES OVER WHICH THE BOARD IS VESTED WITH JURISDICTION ONLY BY CESSION FROM THE BOARD. IN THE ABSENCE OF A CESSION AGREEMENT STATE POWER REMAINS PRECLUDED WHETHER OR NOT THE BOARD CHOOSES TO ASSERT ITS JURISDICTION.

Questions of federal preemption—whether state power to regulate conduct concerning which Congress has legislated is or is not superseded—turn, of course, on the intention of Congress. It is only where Congress has been silent as to whether its legislation shall or shall not exclude state regulatory power over the subject that resort may be had to implications or consequences to determine whether the federal regulatory scheme is exclusive or allows state regulation of the same conduct. *Rice* v. *Santa*

Fe Elevator Corporation, 331 U. S. 218, 236. It is for Congress to determine whether state regulation is a "blessing" or a "bane", and only when Congress has failed to deal with that issue is it for the courts to decide on policy considerations.

Congress frequently is silent as to the effect of its legislation on state laws. And in some cases, although the "implications of exclusiveness" are clear, difficult questions result from the failure of Congress to define the scope of the field which the federal legislation is intended to occupy. *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468, 476. But on the phase of the preemption problem at issue here—whether the states may apply law or policy which overlaps the provisions of the national Act to cases which arise in borderline industries over which the Board for administrative reasons declines to assert jurisdiction—Congress spoke clearly and unequivocally when it enacted the proviso to Section 10(a).

The problem was focused for Congress by the decision of this Court in *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U. S. 767. In that case, the Court held that New York was without power to compel an employer to bargain with a unit of supervisors, even though at the time the case was decided New York's policy on that issue was identical with federal policy. The Court rejected the state's contention that "while federal power over the subject is paramount, it is not exclusive • • • until the federal power is actually exercised as to the particular employees, State power may be exercised," 330 U. S. 767, 771, 776.

Anticipating the instant problem, the Court noted that it was the national Board's practice "to decline jurisdiction in certain types of cases, for budgetary or other reasons • • •." 330 U. S. at 776. It also took note of the

National Board's practice of ceding to states which had enacted laws consistent with the Wagner Act, jurisdiction to handle cases in these local industries over which the Board customarily refused to assert jurisdiction for budgetary reasons (*ibid.*). These cession agreements between the national Board and state boards, the court characterized as a "commendable effort to avoid conflict" (*ibid.*). But the court reserved the question whether the Board was empowered by the Act thus to cede jurisdiction to the states to regulate relations which "federal power reaches" (330 U. S. 767, 770), but which the Board administratively eschews. It refrained from passing on that question because in that case the Board's declination was not based on budgetary or other administrative considerations but on a policy relating to the merits of the issue, and "the National Board made no concession or delegation of power [to the State] to deal with this subject." 330 U. S., at 776.

However, in a concurring opinion in which Mr. Justice Murphy and Mr. Justice Rutledge joined, Mr. Justice Frankfurter said (330 U. S., at 779):

> I cannot join the Court's opinion because I read it to mean that it is beyond the power of the National Board to agree with State agencies enforcing laws like the Wagner Act to divide, with due regard to local interests, the domain over which Congress had given the National Board abstract discretion but which, practically, cannot be covered by it alone. If such cooperative agreements between State and National Boards are barred because the power which Congress has granted to the National Board ousted or superseded State authority, I am unable to see how State authority can revive because Congress has seen fit to put the Board on short rations.

Later, in the same opinion, Mr. Justice Frankfurter pointed out that "The vast range of jurisdiction which the National Labor Relations Act has conferred upon the

Board raises problems of administration wholly apart from available funds. As a result of this Court's decision in *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601, untold small enterprises are subject to the power of the Board." After pointing out that "in their individualized aspects" labor relations in these enterprises are "equally the concern of their respective localities", the opinion cited the Board's Annual Reports which show "increasing arrears" in explanation and justification of the Board's desire "to share burdens" with states which seek to enforce a common policy. Noting that the national Board in its brief had asked the Court to enunciate a rule which would permit the states to enforce consistent laws where the Board declined to assert jurisdiction, *supra*, p. 41, Mr. Justice Frankfurter concluded that the majority's opinion "would forbid the aid which the agency of Congress seeks in carrying out its duty. It is surely a responsible inference that the result will be to leave uncontrolled large areas of industrial conflict." 330 U. S. 767, 784.

The *Bethlehem* case was decided on April 7, 1947. Ten days later, the Senate Committee reported out S. 1126, containing the following proviso to Section 10(a):

> *Provided*, that the Board is empowered by agreement with any agency of any State or Territory to concede to such agency jurisdiction over any cases in any industry, other than mining, manufacturing, communications, and transportation, except where predominately local in character even though such cases may involve labor disputes affecting commerce, provided the State agency conforms to national policy, as herein defined, in the determination of such disputes.

In conference, the word "concede" was changed to "cede" and the phrase "provided the State agency conforms to

national policy, as herein defined, in the determination of such disputes", was changed to read: "unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith."[31]

This Court has pointed out that "the purpose of the proviso" to Section 10(a) was "to meet situations made possible by *Bethlehem Steel Co.* v. *New York State Labor Relations Board,* 330 U. S. 767, where no State agency would be free to take jurisdiction of cases over which the National Board had declined jurisdiction. See H.R. Rep. No. 245, 80th Cong. 1st Sess. 40; S. Minority Rep. No. 105, p. 2, 80th Cong., 1st Sess. 38." *Algoma Plywood & Veneer Co.* v. *Wisconsin Employment Relations Board,* 336 U. S. 301, 313. The legislative history of the proviso estab-

[31] Addition of the proviso was the only change which Congress made in Section 10(a) because of the preemption problem. Reference to the Board's power as "exclusive" was eliminated from the second sentence in the Section, but, as this Court recently noted (*United Automobile Workers, etc.* v. *Wisconsin Employment Relations Board,* 351 U. S. 266, 271), "The omission was explained in the Conference Report" as a reflection of the new Act's "provisions authorizing temporary injunctions enjoining alleged unfair labor practices [Section 10(j) and (l)] and * * * making unions suable (Section 303)." H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 52. Because to that extent the Board's power would no longer be exclusive, Congress believed it inappropriate to continue to use that term. Moreover, as the quotation from the Conference Report in the *United Automobile Workers* case shows, 351 U. S. at 271-272, note 8, the purpose of retaining the second sentence of Section 10(a) was to make it clear that in these cases, where the Act vested other tribunals in addition to the Board with jurisdiction, these remedies would be cumulative and that resort to one would not preclude the others. Thus, the legislative history confirms the conclusion of this Court in the *Garner* case, 346 U. S. 485, 492-493, that although the second sentence of Section 10(a) "seems to contemplate a remedy to supplement, rather than to substitute for, existing ones", it was not designed or intended to sanction the application of state law to the kind of union and employer conduct which is regulated exclusively by the provisions of the Act.

lishes unequivocally that Congress enacted it because it believed that even states which enacted statutes identical with the Taft-Hartley Act would otherwise be powerless to regulate the relatively local enterprises over which the Board, for budgetary or other administrative reasons, declined jurisdiction. It enacted the proviso as the alternative to leaving "uncontrolled large areas of industrial conflict," which were subject to federal power, but over which the Board declined to assert jurisdiction.

The House Report (H.R. 245 on H.R. 3020, p. 40), explained that supersedure of state power to deal with conduct within the scope of the Act was necessary "in order to provide for uniformity in matters of national policy under the commerce clause. The Labor Act is an illustration of such a policy. It can readly be seen what mischief might be wrought if, for example, foremen should be subject to state law at the same time that the workers they supervise are subject to national law." The Senate Report stated (S. Rep. No. 105 on S. 1126, p. 26): "Section 10(a): The proviso which has been added to this subsection permits the national Board to allow State labor-relations boards to take final jurisdiction of cases in border-line industries (*i. e.*, border line insofar as interstate commerce is concerned), provided the State statute conforms to national policy." In the same report, the minority of the Committee said (p. 38):

> (c) *Concession of Federal jurisdiction to States.*—Section 10 (a) adds a proviso to the present act empowering the Board to concede to any agency of any State or Territory jurisdiction over any cases not predominantly national in character even though such cases involve an effect upon interstate commerce. We agree with the majority that it is desirable thus to clarify the relations between the National Labor Relations Board and the various agencies which States have set up to handle similar problems. This pro-

posal is made necessary by the decision of the Supreme Court in *Allegheny Ludlum Steel Corp.* v. *William J. Kelley and H. Myron Lewis, etc.*, decided on April 7, 1947.

The Report of the Conference Committee, H. Conf. Rep. No. 510, on H.R. 3020, p. 52, describes the proviso to Section 10(a) as:

> authorizing the Board to cede jurisdiction over any cases in any industry to State and Territorial agencies, subject to two conditions: (a) That it can cede jurisdiction in cases arising in mining, manufacturing, communications, and transportation only when the employer's operations are predominantly local in character, and (b) that it may cede jurisdiction only if the applicable provisions of the State or Territorial statute and the rules of decision thereunder are consistent with the corresponding provisions of the National Act, as interpreted and applied by the Board and by the courts.

This Court has recognized that Congress intended to bar the states from enforcing overlapping state law or policy except pursuant to a cession agreement authorized by the proviso. In *Amalgamated Association, etc.* v. *Wisconsin Employment Relations Board*, 340 U. S. 383, 397-398, the Court said:

> When it amended the Federal Act in 1947, Congress • • • was • • • well aware of the problems in balancing state-federal relationships which its 1935 legislation had raised. The legislative history of the 1947 Act refers to the decision of this Court in *Bethlehem Steel Co.* v. *New York Labor Board*, 1947, 330 U. S. 767, and, in its handling of the problems presented by that case, Congress demonstrated that it knew how to cede jurisdiction to the states.

In a footnote to this statement the Court said:

> A proviso of § 10(a) authorizes cession of jurisdiction to the states only where the state law is consistent

> with the federal legislation. This insures that the national labor policy will not be thwarted even in the predominantly local enterprises to which the proviso applies. S. Rep. No. 105, 80th Cong., 1st Sess. 26 (1947). See also minority views to same report, *id.*, pt. 2, 38, agreeing as to this feature of the legislation.

The text then continues:

> Congress knew full well that its labor legislation "preempts the field that the act covers insofar as commerce within the meaning of the act is concerned" and demonstrated its ability to spell out with particularity those areas in which it desired state regulation to be operative. H.R. Rep. No. 245, 80th Cong., 1st Sess. 44 (1947).

In a footnote to this statement the Court cited Section 10(a) and Sections 8(d), 14(b), 202(c) and 203(b) as "examples of congressional direction as to the role that states were to play in the area of labor regulation covered by the Federal Act."

That the proviso unambiguously precludes the states from enforcing even a policy identical with federal policy except pursuant to a cession agreement with the national Board is highlighted by this Court's reference to it as exemplifying the manner in which Congress supersedes state regulatory power when it desires to do so. "* * * when state enforcement mechanisms so helpful to federal officials are to be excluded, Congress may say so, as in the Taft-Hartley Act, 29 U. S. C. (Supp.) § 160(a)." *California* v. *Zook*, 336 U. S. 725, 732.

Analysis of its language, its context and its purpose unite, as we demonstrate below, in confirming what spontaneous reading and the legislative history of the proviso make plain: "refusal by the NLRB to entertain * * * [a] grievance on its merits [does] not of itself alter the pertinent law thereby revesting the state court with authority

to proceed. Amended Section 10(a) of the Act specifically provides * * * the only way state authorities can be vested with authority now within the exclusive purview of the Act. Unless and until there is an express ceding of jurisdiction to a proper state agency exclusive jurisdiction remains in the federal agency." *Retail Clerks Local No. 1564* v. *Your Food Stores*, 225 F. 2d 659, 663 (C. A. 10).[32]

1. The proviso was designed to clarify the scope of state regulatory power in those industries, "border line insofar as interstate commerce is concerned" (p. 64, *supra*), over which, as "Congress was fully cognizant" (*Haleston Drug Stores* v. *National Labor Relations Board*, 187 F. 2d 418, 421 (C. A. 9)), the Board customarily declined to assert the jurisdiction which the Act vested in it. Seeking clarity, if Congress had intended that the Board's declination for budgetary reasons to assert jurisdiction should remove the preemption bar to state action, it would have said so. That conclusion is buttressed by the fact that when, in the same statute, Congress dealt with the respective roles which should be played by federal and state mediation agencies in labor disputes "which would have only a minor effect on interstate commerce," it required the parties involved to notify the state as well as

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[32] Accord: *Capital Service* v. *National Labor Relations Board*, 204 F. 2d 848, 855 (C. A. 9) ("We construe this amendment [of Section 10(a)] as giving to a state a right of enforcement only by an agreement reached by it with the board"); *Food Basket, Inc.* v. *Amalgamated Meat Cutters and Butcher Workmen of North America*, decided October 21, 1955, (Court of Appeals of Kentucky) not officially reported, but reported unofficially in 29 C. C. H. Labor Cases ¶ 69,561 pp. 90, 159 n. 1; *Universal Car Co.* v. *Ass'n. of Machinists* (Cir. Ct. Kent County, Mich.), reported unofficially at 35 LRRM 2087; *New York State Labor Relations Board* v. *Wags Transportation System*, 130 N. Y. Supp. 2d 731, aff'd on other grounds, 284 App. Div. 883, 134 N. Y. Supp. 2d 603; *Graybar Electric Company, Inc.* v. *Automotive, Petroleum & Allied Industries Employees Union No. 44*, ... Mo. ...., 278 S. W. 2d 794, 803 (*en banc*).

the federal agency of the pendency of the dispute, and instructed the federal agency to "avoid" mediation efforts "if State or other conciliation services are available to the parties." Labor Management Relations Act, Section 203(b). Thus, differentiating between "matters [which] are to be taken over by the federal government and matters which should be left to the States" (p. 23, *supra*), Congress gave free rein to the states in the field of mediation of local disputes, but imposed conditions upon state regulation of the use by the parties of traditional weapons of economic conflict. It is evident that Congress believed that the national interest would not be jeopardized by state mediation efforts in these local disputes, but that it was necessary, in the national interest, to guard against the danger of application of inconsistent state policies to conduct as to which Congress had adopted a policy of its own. Congress considered uniformity of national labor policy more important than the interest of the states in regulating economic conflict under different policies which the state might prefer.

2. Specification of one method by which the states may acquire jurisdiction to regulate conduct which Congress gave the Board jurisdiction to regulate itself implies that the states may not acquire jurisdiction in any other way. *Inclusio unis est exclusio alteris.* In the present context that inference is particularly valid for Congress was aware of the possibility of permitting the states to acquire jurisdiction by either of two methods—declination of jurisdiction by the Board and cession agreements—and selected only the more restrictive one. It seems beyond challenge that Congress deliberately intended to shut the door to state jurisdiction where the Board did not cede but merely declined to assert its own jurisdiction, for Congress drafted the proviso on the assumption that except as specific authorization was granted by the Act, state power would

not "be operative." *Amalgamated Ass'n.* case, *supra*, p. 66.

3. To permit the states to apply their own laws merely because the Board declines to assert jurisdiction over the labor dispute would defeat the purpose of the limitations which Congress imposed upon the Board's power to cede jurisdiction to the states. The purpose of denying to the Board power to cede jurisdiction unless state law is consistent with the federal Act was to insure "that the national policy will not be thwarted even in the predominantly local enterprises to which the proviso applies." *Amalgamated Ass'n.* case, *supra*, p. 66.

In those industries where the Board fails fully to effectuate the policies of the national Act by declining to assert jurisdiction, national policy may yet be thwarted by the application to the parties of inconsistent state policies. Thus, where the Board declines to afford redress against an employer who discriminates against employees for engaging in concerted activities which Section 7 protects, it fails to accord the full measure of security which Congress intended to attach to the exercise of those rights. Such inaction, however, does not preclude employees from exercising their rights. Application of a state policy which treats such protected concerted activity as illegal and enjoinable does prevent it, and thwarts Congress' policy completely.

The objectives which Congress sought to promote through the policies of the Taft-Hartley Act, as distinguished from the Wagner Act, are particularly susceptible to nullification through application of inconsistent state policies. One of Congress' paramount objectives was to "equalize" the status of employers and labor organizations by treating the conduct of both groups of which Congress disapproved as unfair labor practices. (93 Cong. Rec. 4133, 4204, 4437,

4845, in 2 Leg. Hist. L. M. R. A., 1058, 1118, 1209, 1368.) Application of any state law which illegalized the prohibited conduct of one group but left the prohibited conduct of the other immune to restraint would thwart this basic objective. States like New York, which had enacted statutes patterned after the Wagner Act, would redress employer unfair labor practices but provide no remedy at all against some or all of the conduct of unions which Congress outlawed as unfair labor practices. On the other hand, those states, like Ohio, which had no labor relations statute, and governed labor relations pursuant to common law tort concepts, would provide a remedy for some or all acts of unions which Congress outlawed, but would provide no remedy to employees against some or all of the employer unfair labor practices which Congress equally condemned. Where the Board declines for administrative reasons to assert jurisdiction over an industry, exclusion of state law maintains equality of treatment of all parties, for the Board declines to process unfair labor practice charges against any. Both sides are left to the free play "of economic forces." *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468, 480. But if the states were to step in with laws not patterned upon the federal, the balance of rights and equities which Congress sought to establish between the parties in such disputes would be upset.

Congress also sought to accomplish important national objectives by imposing limitations upon the Board's power to grant relief. To permit the states to accord relief without observing these limitations would thwart effectuation of the objectives Congress sought to achieve through the limitations.

The most important limitations are contained in Sections 9(f), (g) and (h) in which the Congress barred resort to the Act's remedies to labor organizations which refused

to rid themselves of Communist leadership or refused to file relevant financial information. *United Mine Workers v. Arkansas Oak Flooring Co.*, 351 U. S. 62. If the Board's refusal to act for budgetary reasons left the states free to accord remedies under their own laws, New York and Utah, for example, would be free to accord remedies against employer unfair labor practices to unions which refused to comply with the provisions of Sections 9(f), (g) and (h). Clearly, this would, *pro tanto*, nullify Congress' plan for ridding the labor movement of Communist leadership and for assuring that union members have information concerning the financial affairs of their union. *Kaiser-Frazer Parts Corp.*, 80 NLRB 1050, 1052; cf. *Amazon Cotton Mill Co.* v. *Textile Workers Union*, 167 F. 2d 183 (C. A. 4).

Many other Taft-Hartley objectives would be thwarted by permitting application of state laws, partially, but not wholly, consistent with the federal Act. For example, Congress determined that in this field an unusually short period of limitations, six months, was desirable. Section 10(b). States which accorded remedies against outlawed conduct on charges filed after a longer period sanctioned by the state would thereby frustrate the objectives which led Congress to fix the six month limit. In Section 10(c) Congress directed the Board to disregard affiliation or lack of affiliation with a national or international union in deciding cases alleging that a labor organization has been unlawfully assisted, supported or dominated by the employer. State laws outlawing company unions might, on the other hand, draw such a distinction and thereby reverse Congress' judgment. To the extent that Section 8(c) goes beyond the First Amendment, and the Fourteenth as it embodies the First, in according employers "freedom of speech" in labor matters, state laws might be more restric-

tive, and thereby trench on employer conduct which Congress determined to leave free. In Section 8(d), Congress provided that the duty to bargain collectively which it imposed on both employers and labor organizations shall not "compel either party to agree to a proposal or require the making of a concession." States enforcing their own comparable collective bargaining policies might require the parties to go further, thereby imposing a measure of obligation which Congress deliberately rejected.

We have shown above, pp. 42-55, *supra*, how a state thwarts the national Act's policies when it sanctions employer-induced repudiation of a union; when it permits employers, by coercion, to destroy the status of a union as exclusive bargaining agent, and when it enjoins peaceful picketing for purposes other than those which the national Act outlaws.

4. To avoid conflicts such as these, the proviso was deliberately phrased to assure that no state can acquire jurisdiction unless it undertakes to treat the dispute just as it would be treated if the Board exercised its jurisdiction. Congress understood that it would be impossible for any state to achieve consistency with national policy if it relied upon its courts to establish policy in the field of labor relations by common law methods. Consequently, in describing the standards which a state must meet to qualify for cession, the proviso uses the term "statute" rather than the terms "law" or "policy" which might be broad enough to encompass rules established by a state judiciary.

The language also shows that Congress understood that its policies could be substantially thwarted even in those instances where a state enacted a statute identical in terms with the national Act. It knew that national labor policy consists largely of interpretations of the Act through deci-

sions of the Board and the federal courts, p. 65, *supra*. To guard against conflicts which would result from different constructions of identical language,[33] Congress precluded cession even where the state statute is in terms consistent unless the state statute is also interpreted and applied consistently with the interpretation and application of the federal Act.

The language further demonstrates that Congress was concerned that there be not only complete consistency in substantive rules, but that there also be consistency in procedure and approach to the application of those rules. Having rejected the "court approach" for reasons of substance, pp. 55-59, *supra*, Congress precluded cession to any state which sought to regulate traditional weapons of economic conflict through its courts on "private initiative" (*Garner* v. *Teamsters Union*, 346 U. S. at 501), without the intervention of an administrative agency. Thus, Congress authorized the Board to cede its jurisdiction only to state and territorial "agencies," not to private parties or to state courts.

5. To undertake determination, in the absence of a cession agreement, whether state law meets the consistency requirement would transfer to the courts a responsibility which Congress in the proviso deliberately vested in the Board in the first instance. Congress entrusted the Board with the duty of effectuating the consistency limitation by withholding from the Board power to enter into cession agreements with any state agency unless the state statute was consistent with the federal. Before making a cession agreement, the Board is therefore required carefully to examine the state statute and its construction and appli-

[33] That form of conflict would be exemplified by a state which required employers to refrain from interference, restraint or coercion with employee self organizational rights, but which excluded employer circulation of union repudiation petitions from that category.

cation. Only after it is satisfied as to consistency with the federal Act may the Board properly make a cession agreement.

Determination, in advance of its application to a particular dispute, whether state law is consistent with federal, is a typically administrative, not judicial, function. That Congress deliberately, as the legislative history shows, pp. 62-63, *supra*, provided for such determinations by the Board, suggests that Congress was aware of the burden which would be cast upon the courts if it left questions of consistency between state and federal law entirely to adjudication on a case-by-case basis after state law had been applied to particular disputes. The cession agreement method eliminates much, if not all, of that burden. For if the Board finds inconsistency, it cannot and will not cede, and the state statute therefore cannot be given effect. If, on the other hand, state law is applied pursuant to a cession agreement with the Board, its application bears at least that *prima facie* validity which stems from an initial determination by the Board that the state statute is consistent, in terms and interpretation, with the federal Act.

To by-pass the absence of a cession agreement and inquire whether state law as applied to a particular dispute is consistent with the federal Act is thus to discard the method which Congress chose to effectuate its requirement that only consistent state laws be applied to labor disputes subject to federal power.

6. By selecting cession agreements, rather than mere declination of jurisdiction by the Board, as the method for transferring regulatory power to the states in borderline industries Congress avoided the uncertainty and conflicts which would have resulted if state jurisdiction were made to rest entirely on the Board's decision as to whether or not to assert jurisdiction at any given time. The con-

siderations which lead the Board to decline jurisdiction are themselves variables, and that alone assures that the area of industry over which the Board asserts jurisdiction will vary from time to time. See p. 26, *supra*. When the Board in July, 1954, raised its dollar value standards, it ceased suddenly to process many cases in industries which satisfied its earlier jurisdictional criteria. If state power were to flow from the Board's declination, state power would again terminate if and when the Board later lowered its sights.[34] Uncertainty as to whether and when the Board may alter its standards can be a fertile source of conflict. "The uncertainty as to which board is master and how long it will remain such can be as disruptive of peace between various industrial factions as actual competition between two boards for supremacy." *LaCrosse Telephone Corp.* v. *Wisconsin Employment Relations Board*, 336 U. S. 18, 26.

Prior to 1950, when the Board first attempted to codify its administrative policies, ascertainment whether the Board would or would not assert jurisdiction necessarily, in most cases, awaited decision by the Board on a case-by-case basis. Since, in these cases, the state could not act until the Board conducted its investigation, held a hearing, and issued its decision declining jurisdiction, state intervention would come too late to be effective in the dispute. Even after enunciation of the policy standards in 1950, and their later revision, the volume of Board decisions which deal with application of the standards, and the frequency of dissent among Board members in these cases, shows that ascertainment whether the Board will or will not assert its jurisdiction often is by no means easy.[35] To make state

[34] *Cf. Retail Clerks* v. *Your Food Stores of Santa Fe*, 124 F. Supp. 697, 703, rev'd, 225 F. 2d 659, 663 (C. A. 10).

[35] See, e. g., *Deskins Super Market*, 115 NLRB No. 252; *Gary Hobart Water Corp.*, 115 NLRB No. 253.

jurisdiction turn on the Board's policies in this area would leave the states largely uncertain as to the areas in which they are free to act. As the court said in *Universal Car Co.* v. *Association of Machinists,* Circuit Court, Kent County, Michigan, decided November 1, 1954, 35 LRRM 2087, 2098:

> If the jurisdiction of the state courts is to depend—not upon the act of Congress and the actual jurisdiction of the NLRB—but upon the day-to-day or month-to-month discretionary exercise of jurisdiction by the Board, dependent upon changing budgetary conditions or upon its economic, social or political views at the moment, then neither the courts nor the litigants can know with any certainty where jurisdiction lies, nor whether in a given case jurisdiction existing at the time of its commencement will continue until its final decision.
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> • • • • •
>
> If it is necessary to choose between assuming that Congress did not intend a void in cases where the Federal Board refuses to exercise its jurisdiction and assuming that it did not intend to create chaos, I would have to conclude that the latter assumption was entitled to the greater weight.

The cession method Congress selected gave promise of assuring stability and certainty in the transfer of power to the states and vice versa. Cession agreements would undoubtedly fix the duration, as well as the scope, of state jurisdiction, and not leave state power dependent entirely on the national Board's whim. Moreover, federal and state agencies could provide for administrative machinery to resolve jurisdictional problems in cases which their agreement did not clearly cover, as the national Board and the New York Board did in the agreement between them referred to in the *Bethlehem* case.

These considerations, among others, led the Court of

Appeals for the Tenth Circuit in *Retail Clerks Local No. 1564* v. *Your Food Stores*, 225 F. 2d 659, 663, to hold:

> Unless and until there is an express ceding of jurisdiction to a proper state agency exclusive jurisdiction remains in the federal agency. For sake of order such must be true. Otherwise, an interminable problem of determining jurisdiction would exist, throwing needless confusion into an area clearly pre-empted by Congress.

7. To hold that the states may acquire jurisdiction otherwise than through a cession agreement would remove the incentive which Congress provided to induce the states to bring their laws into conformity with the national Act. Only if the states may not exercise jurisdiction over labor disputes in local industries unless they bring their statutes into conformity with the national Act can acquisition of jurisdiction under the proviso serve its function as a spur to the states.

8. Nullification of the proviso is the consequence of the argument that state courts acquire jurisdiction to regulate labor disputes by virtue of the Board's administrative declination. Moreover, the premise on which the argument for nullification rests—that Congress could not have intended to leave remedyless persons whose rights under federal law are invaded—does not support the conclusion. If Congress had intended to afford the parties an alternate remedy in cases where the administrative remedy was withheld presumably it would have vested jurisdiction in the federal courts. That is the normal presumption where Congress creates rights but provides no administrative enforcement method. *Texas & N. O. R. Co.* v. *Brotherhood, etc.*, 281 U. S. 548, 569, 570; *Steele* v. *Louisville & N. R. Co.*, 323 U S. 192, 207. But any presumption that Congress intended the federal courts to afford relief against

unfair labor practices at the suit of private parties where the Board declines to act is here refuted by Congress' unequivocal determination that federal courts are not to intervene except on application by the Board, pp. 55-59, *supra*. *Cf. Bakery Sales Drivers Local Union* v. *Wagshal*, 333 U. S. 437, 442. Congress rejected enforcement on private initiative through the federal courts not because it had less faith and confidence in the federal courts than in state courts, but because it considered the "court approach" an inadmissible method of enforcement. "The same reasoning which prohibits federal courts from intervening in such cases, except by way of review or on application of the federal Board, precludes state courts from doing so." *Garner* v. *Teamsters Union*, 346 U. S. 485, 491.

That the proviso mentions only state and territorial "agencies", itself suggests, as we have shown, pp. 72-73, *supra*, that Congress considered state courts, like the federal courts, inappropriate instrumentalities for exercising the jurisdiction which Congress vested in the Board. In any event, to hold that in the absence of a cession agreement state administrative agencies are barred from asserting jurisdiction but that state courts are free to regulate the same conduct would mean that the more consistent with federal policy a state law is, the less free is the state to apply it. That would stand Congress' policy on its head. "* * * the reasons for excluding state administrative bodies from assuming control of matters expressly placed within the competence of the federal Board also exclude state courts from like action." *Garner* v. *Teamsters Union*, 346 U. S. 485, 491; *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468, 479. See also Brief for the National Board as *Amicus Curiae* in *Garner* v. *Teamsters Union, No. 56*, Oct. Term, 1956, pp. 33-41.

The question at issue here, and the basic question with which the proviso to Section 10(a) deals, is the existence of state power to regulate in the preempted field. To the extent that Congress permitted state power to survive, as it did in matters of violence, mass picketing and overt threats, it was unconcerned whether the states chose to exercise their powers through administrative agencies or through their courts. *United Automobile Workers* v. *Wisconsin Employment Relations Board & Kohler Co.*, 351 U. S. 266, 275. To the extent that Congress imposed limitations upon the character and means of state regulation in the preempted field, it did so on the premise that state power over the conduct involved was totally superseded and that it could revive only upon the state's undertaking to exercise such power in conformity with the conditions Congress deemed necessary to protect the public interest.

9. Whatever of substance may be thought to inhere in the argument for nullifying the proviso to Section 10(a) stems from the fact that the states did not, after its enactment, pass statutes consistent with the federal Act, p. 34, *supra*. For if they had, the Board would have been able to exercise the power which Congress gave it to vest jurisdiction in the states over the borderline industries in which the Board declined to assert its jurisdiction. Had the Board thus ceded its jurisdiction, there would have been no room for the argument that the Board's declination leaves parties remedyless.

For this reason, the Report of the Joint Committee on Labor Management Relations to the second session of the 80th Congress, as it relates to the present issue, carries unusual weight. The Committee had been established pursuant to the terms of the Act itself (Sections 401-403), to study and investigate the "administration and opera-

tion" of the new law and to make recommendations to the Congress of desirable amendments or changes.

The report was written a year after Taft-Hartley's passage, at a time when it was already clear that the states had not placed themselves in a position to acquire jurisdiction by cession from the Board, and that jurisdiction could not be transferred to the states pursuant to the proviso. The report reveals that Congress knew exactly what it was doing, and meant exactly what it said, in permitting the states to assert jurisdiction in the borderline industries only pursuant to cession agreements. The question with which the committee dealt was whether it was desirable in the light of experience to eliminate the limitations of the proviso and permit the states to assert jurisdiction under their own laws in those areas where the Board was unwilling or unable to assert its regulatory powers. The Committee said (S. Rep. No. 986, Part I, pp. 30-31):

> The proviso to section 10(a) of the act authorizes the National Labor Relations Board to cede to State agencies, jurisdiction over cases in any industry other than mining, manufacturing, communications, and transportation except where predominantly local in character. The right to cede such jurisdiction is limited, however by the requirement that the applicable provision of the State statute must not be inconsistent or have received a construction inconsistent with the corresponding provision of the act.
>
> The National Labor Relations Board has not reached agreement with any State agency since passage of the act. Extensive conferences have been held with officials of New York, Massachusetts, Pennsylvania, and Wisconsin looking toward the type of agreement permissible under section 10(a). Generally speaking, the statutes in these States were modeled after the Wagner Act. Corresponding sections of their statutes and the Labor-Management Relations Act of 1947 have

about the same degree of inconsistency as is found between the latter act and the Wagner Act. Some state statutes for example have not defined union unfair labor practices, nor have they limited the right to enter into compulsory union membership contracts. *It therefore appears that ceding of jurisdiction in unfair labor practice cases will not be possible unless and until a State enacts a statute modeled after the act.*

The Board's experience in attempting to work out agreements with the State agencies has demonstrated that it will only be possible with a State which enacts a statute following the Federal pattern. *The act requires a uniform national policy with respect to all industries whose operations substantially affect interstate commerce.*

The Board is now receiving a tremendous volume of cases. The desirability of permitting it to reduce this load of cases by ceding jurisdiction over *borderline industry, businesses primarily local in nature whose operations only indirectly affect interstate commerce,* appears obvious. However, if it can only be done by *an amendment to the act which would permit inconsistent regulations* and as many different policies as there are States having labor relations acts, *the desirability appears questionable.* (Italics added.)

Subsequently, bills were introduced to eliminate the proviso and substitute language permitting the states to exercise jurisdiction where the national Board declines to act.[36] The terms of the proposed amendments show that their sponsors recognize that, as the Act stands, state power, whether exercised by administrative agencies or

[36] S. 1264, 83rd Cong., 1st Sess., 99 Cong. Rec. 1845-1848 (1953); S. 2218, 83rd Cong., 1st Sess., 99 Cong. Rec. 7283-7284 (1953); S. 2650, 83rd Cong., 2d Sess., 100 Cong. Rec. 91, 100 Cong. Rec. 5194, 5824, S. Rep. No. 1211, 83rd Cong. 2nd Sess. (1954). In 1949 Senator Taft offered an amendment which would have permitted the National Board to cede jurisdiction to state boards over cases in which the National Board declined to act "even though the State law is not entirely consistent with the Federal law." 95 Cong. Rec. 8506, 5590, 81st Cong., 1st Sess.

courts, is preempted and may revive only by cession from the Board.[37] Although the Act has been amended since 1947,[38] these proposals have not been adopted.

In sum, it cannot be said that by adopting a plan and pattern of regulation which is exclusive, Congress created a power "vacuum" in areas where the Board is unable or unwilling to assert its authority. Congress' plan permits, indeed encourages, the states to exercise regulatory power in a portion of the field preempted by the Act. But, on balance, Congress has thus far deemed it more important to exclude inconsistent state policies and enforcement mechanisms than to assure that a remedy of some kind is available to all parties at all times and under all circumstances. Judgments of this kind, of course, are for

[37] S. 1264, 83rd Cong., 1st Sess., 99 Cong. Rec. 1845-1848 (1953) provided as follows:

> That section 6 of the Labor Management Relations Act, 1947, as amended, is amended by inserting '(a)' before the section number and by adding at the end thereof a new subsection as follows:
>
> "(b)(1) The Board, in its discretion, may decline to assert jurisdiction over any labor dispute where, in the opinion of the Board, the effect on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction.
>
> "(2) Nothing contained in this Act shall be deemed to prevent or bar any agency, or the courts, of any State or Territory, from assuming jurisdiction over labor disputes over which Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction.
>
> "(3) The Board, in its discretion, may, by agreement with any agency of any State or Territory, cede to such agency jurisdiction over labor disputes involving (A) unfair labor practices or (B) controversies concerning representation, in any industry or portion thereof, even though such labor disputes may substantially affect commerce."
>
> Sec. 2. The proviso in section 10(a) of such Act is hereby repealed.

[38] Act of October 22, 1951, Public Law 189, 82nd Cong., 1st Sess., 65 Stat. 601.

Congress to make, and the wisdom of its decision is not an appropriate subject of judicial inquiry.

By resort to state courts in these cases, parties over whom the Board declines to assert jurisdiction for administrative reasons have mistaken their remedy. Under the Act as written, their appropriate recourse is to their respective state legislatures, which, by enacting laws consistent with the federal Act, may establish a foundation for acquisition of jurisdiction through cession from the Board. If such parties, or the states, regard Congress' requirement of consistency and cession as too restrictive or burdensome, they may ask Congress to change it. But they may not ask this Court to override Congress' judgment, for that is not within the scope of judicial power. As the Court said in *Amalgamated Association, etc.* v. *Wisconsin Employment Relations Board*, 340 U. S. 383, 398:

> * * * This Court, in the exercise of its judicial function, must take the comprehensive and valid federal legislation as enacted and declare invalid state regulation which impinges on that legislation.

IV.

OHIO MAY NOT ENJOIN PEACEFUL PICKETING IN FRONT OF THE ENTRANCES TO FAIRLAWN'S STORES ON THE THEORY THAT THE PICKETS ARE TRESPASSERS.

The courts below found that the pickets, employees of Fairlawn and non-employees alike, were guilty of trespass by picketing on premises in which Fairlawn had a property interest at the West Richfield and Tallmadge stores (pp. 9-10, 12, 14, *supra*). At Market Street, although the pickets walked at the same place in relation to the store, there was no claim or finding of trespass because Fairlawn did not have a property interest in the area between the store

entrance and the highway (R. 159; 47, 58). Although the trespass ground cannot, therefore, sustain the injunction below as it applies to the Market Street store, the courts below may have regarded it as a ground independent of the object for enjoining picketing at the West Richfield and Tallmadge stores. Indeed, a separate provision of the decree enjoins defendants from "trespassing" on Fairlawn's property (R. 170).

To allow invocation of the "trespass" theory under the circumstances present here would make a drastic and widespread inroad upon the right peacefully to picket in labor disputes which Sections 7 and 13 of the Act, and the Fourteenth Amendment, guarantee against state impairment. Peacefully to picket is "traditional and permissible in a primary strike." *National Labor Relations Board* v. *Denver Bldg. & Construction Trades Council,* 341 U. S. 675, 687. Where peaceful picketing occurs at a "geographically restricted area" near the entrance to the struck establishment it is protected by Sections 7 and 13 of the Act. *National Labor Relations Board* v. *International Rice Milling Co.,* 341 U. S. 665, 671, 672-673. "* * * preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes" by such picketing is one of the objectives which Congress in the Act sought to promote. *National Labor Relations Board* v. *Denver Bldg. & Construction Trades Council,* 341 U. S. at 692. "* * * it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing." *Garner* v. *Teamsters Union,* 346 U. S. 485, 500.[39]

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[39] See also *Capital Service, Inc.* v. *National Labor Relations Board,* 347 U. S. 501, discussed in *Weber* v. *Anheuser-Busch, Inc.,* 348 U. S. 468, 475-476, 480. Cf. *Wisconsin Employment Relations Board* v. *Teamsters Union,* 267 Wisc. 356, 361, 66 N. W. 2d 318, 321.

The vicinity near the immediate entrance is the traditional and unquestionably the most appropriate place to picket a struck establishment. *Schneider* v. *State,* 308 U. S. 147, 162-165. It is there that the audience to whom the pickets appeal—customers, employees of the picketed employer, and employees of other employers who do business with the struck employer—all appear. It is there that the patronage of the primary employer which the pickets seek to disrupt takes place. See *Thornhill* v. *Alabama,* 310 U. S. 88, 100-101, 104; *Thomas* v. *Collins,* 323 U. S. 516, 533-534. Because peaceful picketing at the entrance to the struck establishment is virtually the only "practicable, effective means whereby those interested—including the employees directly affected—may enlighten the public on the nature and causes of a labor dispute," the right to picket there is protected by the Fourteenth Amendment, as well as by the federal Act. *Schneider* and *Thornhill* cases, *supra;* Cf. Violations of Free Speech and Rights of Labor, S. Rep. No. 1150, 77th Cong., 2nd Sess., Pt. 1, pp. 4-5.

Normally, in the past, the entrance to a business establishment which served the consuming public was located off a sidewalk abutting a public street or roadway. In such cases, where a city owned the sidewalk, it was held that the city could not utilize its powers as property owner to forbid picketing on the sidewalk in front of the store entrance. *Schneider* v. *State, supra; Cf. Jamison* v. *Texas,* 318 U. S. 413, 415-416; *Hague* v. *C. I. O.,* 307 U. S. 496, 515. Indeed, community interests more substantial than the bare right to exercise absolute dominion over property were held insufficient to warrant prohibition of picketing at a store entrance. In the *Schneider* case, for example, the prohibition was designed to avoid littering. Yet that objective, even when coupled with the fact that the ordinance did not foreclose other avenues of communication,

did not save the prohibition. "* * * one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider* case, *supra*, 308 U. S. at p. 163.

Where a private corporation, rather than a municipality, owns the sidewalk area adjacent to the entrance of a business establishment involved in a labor dispute it is equally clear that the state may not utilize its powers to support an exercise of property rights which infringes the constitutional and the statutory right peacefully to picket.[40] As this Court held in *Marsh* v. *Alabama*, 326 U. S. 501, 505-506, where the state supported denial of the use of streets in a company town to distributors of religious literature, who were characterized as "trespassers":

> We do not agree that the corporation's property interests settle the question * * * Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. *Cf. Republic Aviation Corp.* v. *N. L. R. B.*, 324 U. S. 793.

This Court and the courts of appeals have frequently recognized that action taken by an employer pursuant to his "property rights" may impair the exercise of rights guaranteed by Section 7 of the Act, and constitute an unfair labor practice. *National Labor Relations Board* v. *Le Tourneau Co. of Georgia*, 324 U. S. 793; *National Labor Relations Board* v. *Stowe Spinning Co.*, 336 U. S. 226, 232; *National Labor Relations Board* v. *Lake Superior Lumber Co.*, 167 F. 2d 147 (C. A. 6). "Inconvenience or even some dislocation of property rights, may be necessary in order to safeguard the right to collective bargaining."

[40] Cf. *Shelley* v. *Kraemer*, 334 U. S. 1; *AFL* v. *Swing*, 312 U. S. 321.

National Labor Relations Board v. *Stowe Spinning Co., supra; Republic Aviation Corp.* v. *National Labor Relations Board,* 324 U. S. 793, 802, note 8. Applying that principle, the Court of Appeals for the Seventh Circuit, in *Marshall Field & Co.* v. *National Labor Relations Board,* 200 F. 2d 374, 382, held that the employer violated the national Act by using its ownership of a street located between the two buildings of its store to bar access to non-employee union organizers. The court enforced the Board's order (98 N. L. R. B. 88), requiring that such access be permitted.

In recent years retail establishments particularly in suburban areas, have increasingly located their stores at some distance from the street or highway, for the purpose of providing parking facilities for customers and employees. This geographic pattern is particularly prevalent in suburban shopping centers, of which there are already thousands.[41] The stores in these centers, typically, are set back from the road or highway, are reached by driving over paved areas leading directly from the road to the stores, and rarely have public sidewalks parallel to the roadway. To picket a store so located in the course of a labor dispute, the pickets, like casual pedestrians (p. 10, *supra*), must therefore traverse the paved area, "private property", land often owned by or under lease to the employer involved in the dispute.

We do not believe that an employer can immunize himself against peaceful picketing in front of the entrance to

[41] *Allied Plans Biggest Network of Suburban Shopping Centers,* Business Week, January 15, 1955, p. 62; *Cutraters Move to Suburbs,* Business Week, January 22, 1955, p. 47; *Downtown Needs a Lesson From the Suburbs,* Business Week, October 22, 1955, pp. 64-65, 68; *Builder Owner of Largest Shopping Center,* Fortune, May, 1954, p. 44; *How to Expand Shopping Center Zones,* The American City, January, 1956, pp. 116-117.

his store merely by locating his store off a privately owned parking lot, rather than a publicly owned street. Such parking lots, like the sidewalks which parallel the street in urban shopping centers, are provided for the convenience of the shopping public generally. They are uniquely appropriate areas for dissemination to the interested public of information concerning the labor relations of the adjacent stores.

Even if there were a sidewalk parallel to the roadway at the West Richfield and Tallmadge stores there would be no assurance that if the "property rights" argument is sound employees or unions would be allowed by states such as Ohio to picket there. Such sidewalks would be located on "private property" and states might regard the store owner's refusal to permit picketing on the sidewalk as decisive. Aside from the fact that picketing on the highway would be unduly hazardous, in many instances even picketing on the highway would not overcome the "property rights" argument. See p. 10, *supra*.

Even if it were possible, as a practical matter, for a union to picket at a distance remote from the store entrance, in territory not privately owned, to compel the union to do so would impair both the effectiveness of the picketing and other interests which Congress desired to safeguard. Congress sought to preserve the right of unions to bring pressure to bear on the primary employer who is party to a labor dispute but to protect against involvement innocent employers who are strangers to the controversy. *National Labor Relations Board* v. *Denver Bldg. & Construction Trades Council*, 341 U. S. 675, 692. To effectuate these policies, the Board holds that a labor organization must picket as close as possible to the entrance of the primary employer's place of business, and not picket at a "remote approach * * * used by employees

of secondary employers in common with employees of" the primary employer. *Columbia-Southern Chemical Corp.*, 110 NLRB 206, 208. Since remote approaches, as distinguished from the customer parking lot or sidewalk areas adjacent to the store involved, are used by employees of other stores in the shopping center, and by employees of employers delivering merchandise to such other stores, as well as by employees of the struck employer, the union could picket at remote approaches only at the risk of being held to have engaged in an illegal secondary boycott under the federal Act. *Retail Clerks Union*, 116 NLRB No. 99, 38 LRRM 1323, 1324. In any event, picketing at a distance remote from the store entrance would certainly result in greater detriment to neutral employers than picketing at the very entrance to the store involved. To require picketing at a remote approach rather than at the entrance would upset the pattern of rights and immunities as between the various parties which Congress determined to be proper. For this reason the Board has recently specifically held that the legality of peaceful picketing under the national Act should not "depend on title to property." *Retail Clerks Union*, 116 NLRB No. 99, 38 LRRM 1323, 1324, decided August 24, 1956.

We do not contend, of course, that in determining whether the Act protects and permits union activities of various kinds to proceed on property which the employer owns, the employer's property rights are necessarily irrelevant. *Cf. National Labor Relations Board* v. *Babcock & Wilcox Co.*, 351 U. S. 105. We contend only that under circumstances such as are present here, when the employer freely permits the "property" which he owns to be used by employees, customers and casual pedestrians (R. 58), and where the area involved is appropriate and traditionally used for the particular union activity, the

employer cannot use the fact that he happens to own the property to justify foreclosing the activity. To deny permission in a labor dispute for peaceful picketing at a store entrance to employees and union representatives alike is to discriminate against activity which the National Act protects. *Cf. National Labor Relations Board* v. *Stowe Spinning Co.*, 336 U. S. 226.

We contend that the right peacefully to picket at a store entrance under these circumstances cannot turn on whether state courts would find that the employer has or has not technically "dedicated" such property to the public by inviting customers and pedestrians at large to use it so as to preclude him from distinguishing between them and others who seek to use it for the purpose of peacefully publicizing a labor dispute in which the store is involved. State rules concerning when private property has been dedicated to the public cannot control this issue for Congress did not make "the application of the federal act dependent on state law." *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111, 123. The "vagaries of state rules of law may not override provisions" of the national Act. *Rabouin* v. *National Labor Relations Board*, 195 F. 2d 906, 910 (C. A. 8). No matter what policy, public or private, state law may seek to promote, a "State may not prohibit the exercise of rights which the federal Act protects." *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468, 474.

It is on this ground that the Court of Appeals for the Tenth Circuit, properly, we believe, approved the holding of the District Court (per Bratton, C. J.) in *Retail Clerks Local 1564* v. *Your Food Stores*, 225 F. 2d 659, 662, and note 8, approving 121 F. Supp. 339 (D. N. M.), and reversing 124 F. 2d 697, 701-702 (D. N. M.), that a state may not, under circumstances comparable to those present

here enjoin peaceful picketing on the "trespass" theory. Accord: *Food Basket No. 2, Inc.* v. *Local 227, A. M. C.*, Civil No. 18,407, decided May 1, 1956, Court of Appeals of Kentucky, denying application to enjoin the defendants "from picketing upon the property of the Shelbyville Shopping Plaza or otherwise trespassing upon plaintiff's leasehold" (Not officially reported).

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the judgment below should be reversed and the cause remanded with directions to set aside the injunction and dismiss appellee's petition.

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APPENDIX.

The relevant provisions of the Labor Management Relations Act, 1947, 61 Stat. 136, 29 U. S. C. 141, *et seq.*, are as follows:

Sec. 1.

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all, recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

Sec. 2. When used in this Act— • • •

(6) The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or

within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * * *

(9) The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

* * * * *

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

* * * * *

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: * * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9; * * *

(c) The expressing of any views, argument or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Ter-

ritory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9 (a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is re-employed by such employer.

* * * * * *

Sec. 9. (f) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit (A) shall have prior thereto filed with

the Secretary of Labor copies of its constitution and by-laws and a report, in such form as the Secretary may prescribe, showing—

(1) the name of such labor organization and the address of its principal place of business;

(2) the names, titles, and compensation and allowances of its three principal officers and of any of its other officers or agents whose aggregate compensation and allowances for the preceding year exceeded $5,000, and the amount of the compensation and allowances paid to each such officer or agent during such year;

(3) the manner in which the officers and agents referred to in clause (2) were elected, appointed, or otherwise selected;

(4) the initiation fee or fees which new members are required to pay on becoming members of such labor organization;

(5) the regular dues or fees which members are required to pay in order to remain members in good standing of such labor organization;

(6) a detailed statement of, or reference to provisions of its constitution and by-laws showing the procedure followed with respect to, (a) qualification for or restrictions on membership, (b) election of officers and stewards, (c) calling of regular and special meetings, (d) levying of assessments, (e) imposition of fines, (f) authorization for bargaining demands, (g) ratification of contract terms, (h) authorization for strikes, (i) authorization for disbursement of union funds, (j) audit of union financial transactions, (k) participation in insurance or other benefit plans, and (l) expulsion of members and the grounds therefor;

and (B) can show that prior thereto it has—

(1) filed with the Secretary of Labor, in such form as the Secretary may prescribe, a report showing all of (a) its receipts of any kind and the sources of such receipts, (b) its total assets and liabilities as of the end of its last fiscal year, (c) the disbursements made

by it during such fiscal year, including the purposes for which made; and

(2) furnished to all of the members of such labor organization copies of the financial report required by paragraph (1) hereof to be filed with the Secretary of Labor.

(g) It shall be the obligation of all labor organizations to file annually with the Secretary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by subsection (f) (A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f) (B). No labor organization shall be eligible for certification under this section as the representative of any employees, and no complaint shall issue under section 10 with respect to a charge filed by a labor organization unless it can show that it and any national or international labor organization of which it is an affiliate or constituent unit has complied with its obligation under this subsection.

(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the

overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits.

* * * * *

Sec. 10. (b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States, under the rules of civil procedure for the district courts of the

United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723-B, 723-C).

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further,* That in determining whether a complaint shall issue alleging a violation of section 8 (a) (1) or section 8 (a) (2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who

has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

* * * * * *

Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

Sec. 14. (a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

(b) Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

* * * * * *

Sec. 203.

(b) The Service may proffer its services in any labor dispute in any industry affecting commerce, either upon

its own motion or upon the request of one or more of the parties to the dispute, whenever in its judgment such dispute threatens to cause a substantial interruption of commerce. The Director and the Service are directed to avoid attempting to mediate disputes which would have only a minor effect on interstate commerce if State or other conciliation services are available to the parties. Whenever the Service does proffer its services in any dispute, it shall be the duty of the Service promptly to put itself in communication with the parties and to use its best efforts, by mediation and conciliation, to bring them to agreement.

* * * * * *

Sec. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Sec. 302. (a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.

(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.

Sec. 303. (a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to

engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;

(3) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;

(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. Nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under the National Labor Relations Act.

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

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No. 41

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, LOCAL NO. 427, AFL, ET AL.,

Petitioners,

vs.

FAIRLAWN MEATS, INC.,

Respondent.

REPLY BRIEF FOR PETITIONERS.

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REPLY BRIEF FOR PETITIONERS.

As anticipated in our opening brief (pp. 21-22, 82-83), respondents in these cases, a majority of the National Labor Relations Board, and the several State Attorneys General who have filed briefs *amicus curiae*, all argue from a false premise. The false premise is that if Congress intended to allow the states to exercise regulatory power in the borderline industries over which the Board normally declined to assert jurisdiction only pursuant to the proviso to Section 10(a), Congress must have intended to create a "no mans land" in which state power could not operate at all.[1] The premise is false for two reasons: first, Congress could not, and did not, anticipate that state legislatures would refuse to enact

1. See, *e.g.*, Brief for the NLRB, pp. 18, 22-23, 43. We refrain from direct comment on the brief filed by respondent herein because, although that brief was filed months before the brief for the NLRB, it cites and is obviously based upon the Board's brief. See respondent's brief, pp. 19, 37.

laws consistent with the Taft-Hartley Act; second, every state is "empowered" to fill the "vacuum" any time its legislature sees fit to enact a consistent law, so that the NLRB can exercise the power Congress gave it to cede jurisdiction to the state agency created by such a law. Once it is recognized that the "vacuum" flows not from total Congressional inhibition of state *power*, but from the refusal of the states to adopt policies which conform to the policies of Congress, the conclusion that Congress authorized state regulation in borderline industries only pursuant to cession agreements is immune to rational attack.

I. The Alleged Distinction Between "Deliberate" and "Necessary" Declination of Jurisdiction.

A majority of the present Board[2] contends (Br. pp. 37-40), that the Section 10(a) proviso should be deemed to have application only to those areas as to which the Board "deliberately" decides that state regulation is preferable to federal, and not to those "borderline industries" over which the Board declines for "budgetary or other reasons" to assert jurisdiction. The contention is as absurd as it is disingenuous.[3]

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2. Presumably the brief filed for the Board reflects the views of the relatively recently appointed Republican majority. See footnote 13, p. 20, of the Board's brief, and compare the majority and dissenting opinions in *Breeding Transfer Co.*, 110 NLRB 493.

3. Despite the majority's disclaimer in the *Breeding* case, and the express disclaimer in the Board's present brief (p. 38), that the new majority's expansion of the area in which the Board declines to assert jurisdiction reflects any judgment that in this area state rather than federal authority should rule, the Brief of the 7 States asserts flatly (p. 17): "The majority action [in the *Breeding* case] was a considered relinquishment of the field for the exercise of the state's reserved powers". We think it significant that the total lack of *bona fides* and candor of the present Board majority is so blatant that even the States in whose interest the Board's brief was filed cannot acquiesce in the pretense. Neither can the employer-respondent in the *Garmon* case, No. 50, Brief, pp. 20-21.

A. The legislative history set forth in our principal brief, pp. 62-65, shows that the Congress which passed the Act designed the proviso to Section 10(a) to cover precisely those "border line industries, *i. e.*, borderline insofar as interstate commerce is concerned," over which, as Congress knew, the Board declined to assert jurisdiction for "budgetary or other reasons." This Court has repeatedly recognized that Section 10(a) was drafted to govern cases "over which the National Board has *declined* jurisdiction." (Brief for Petitioners, pp. 63, 65-66.) Every subsequent Congress has recognized that the Section 10(a) proviso operates in just that field. (Brief for Petitioners, pp. 80-82; Brief for the AFL-CIO as *amicus curiae*, pp. 14-16, 20-22; Brief for the United Steelworkers of America in No. 280, this Term, p. 37.)

The Board's brief admits (pp. 25-26, 27), that "*Bethlehem* left undecided the question of state power in cases where the federal Board declined jurisdiction 'for budgetary or other reasons'." But it deliberately ignores the fact that Congress, as the Committee Reports clearly show, and as this Court has repeatedly recognized, avowedly enacted the proviso to Section 10(a) to resolve the question left undecided in *Bethlehem*. Congress would hardly have been satisfied that it had "clarified" the situation, if, as the Board's brief now says (p. 28), the new proviso left that problem unresolved "as it was before."

B. The assumption on which the newly invented distinction rests—that prior to Taft-Hartley the Board ceded to states like New York which had laws consistent with the Wagner Act jurisdiction over cases arising in industries over which the Board customarily *asserted* jurisdiction, not over industries in which it consistently *declined* jurisdiction—is simply not true. The Memorandum between the National Board and the New York Board, and the National Board Minute of August 16, 1946, reprinted

as an Appendix to the concurring opinion in the *Bethlehem* case, 330 U. S. 767, 786-795, 796-797, both show that the areas which the National Board conceded to the State Board were those in which the National Board had consistently *declined* to assert its jurisdiction. Repeatedly the Memorandum states that the National Board will *not* allow the State Board to assert jurisdiction over enterprise after enterprise on the ground that in these enterprises "the National Board would customarily assert jurisdiction" or had "originally asserted jurisdiction." The Minute of August 16, 1946, is both illustrative and decisive. The Minute notes that the reason the National Board would not object to having the New York State Labor Relations Board entertain cases involving brokerage houses is that *"The Board * * * would not, at this time, entertain a petition filed on behalf of the employees * * * of such houses because of budgetary and other administrative considerations."*[4]

The assertion that the proviso was directed only to areas of industry over which the Board had consistently *asserted* jurisdiction is a bald attempt, ten years after the event, to rewrite history.

C. The Board's brief argues (pp. 39-40), that the distinction which it draws between "deliberate" cession and cession for "budgetary or other reasons" does not destroy the proviso completely because the Board's present

4. The fact that under the Wagner Act the Board ceded to only a few states jurisdiction over cases which the Board, in any event, administratively declined to handle can hardly be thought to demonstrate that the states with which administrative understandings were not reached acquired more jurisdiction over those enterprises than states like New York. On the contrary, agreement with other states was totally impossible because they, like Ohio and California to this day, had no laws or agencies which could or would protect the employee rights which Congress had created or perform the administrative functions which Congress had vested in the Board.

policy standards do not eliminate the entire area over which the Board is permitted by the proviso to cede jurisdiction to states which have consistent laws. But, since the Board is merely "empowered" not "directed" to assert jurisdiction, what, in principle, would prevent the Board from choosing to decline jurisdiction over all of the industries subject to cession under the proviso by invoking the rubric "budgetary or other reasons"? In any event, is a desire to "enlist the aid of state agencies" (Bd. brief, p. 38) not a "reason" other than budgetary for declining to assert jurisdiction? Perhaps the suggested distinction is rooted in the fact that a "deliberate" refusal to assert jurisdiction, in order to reallocate authority between the states and the nation, would, as Pennsylvania argues, be a clear case of malfeasance. Brief for the Commonwealth of Pennsylvania as *amicus curiae*, pp. 6-13. The purpose of suggesting the distinction appears to be to change the office of the proviso from a method of enabling the states to fill the gap created by the Board's inability, for budgetary or other legitimate administrative reasons, to exercise fully its responsibility under the law, into an authorization to the Board to draw new and different lines between federal and state power for wholly political reasons. See pp. 7-8, *infra*.

D. Ignoring the fact that in brief after brief filed with this Court from 1949 through 1954 the Board flatly declared that the proviso prohibits the states from asserting jurisdiction over cases which the Board declines for budgetary or other reasons to handle (see our main brief, pp. 33-34), the new majority attempts to make it appear that its present contrary position is not new. Thus, the brief says (p. 36, note 21), that the Board has consistently refrained, "as a matter of practice" from "intervening in any way in situations where the States, despite the absence of a cession agreement, have taken action with re-

spect to cases over which the Board declines to assert jurisdiction." That practice, however, reflected limitations of budget and staff, not a determination that, on principle, state action was authorized despite the proviso. As pointed out publicly by one of the writers of this brief in 1952, when he was an Assistant General Counsel of the Board: "The Board's budget and heavy workload simply do not permit it to assign [to intervention in preemption cases] the substantial staff which would be necessary if it were to participate in the literally hundreds of cases involving issues of this character in the state courts."[5] Accordingly, except for filing briefs as *amicus curiae* in appropriate cases in this Court, the Board intervened in preemption cases only where a state agency or a state court "attempted to exercise jurisdiction over a cause which has been adjudicated by the National Board or is pending before it for adjudication."[6]

II. The Alleged Distinction Between Substantive Rights and Procedure.

The distinction urged by the Board's brief between substantive rights and procedure (see pp. 31-36, 41-46), is simply an attempt to substitute for Congress' judgment that a state should be able to assert jurisdiction only if its applicable statute is not "inconsistent with the corresponding provision of this Act" or has not received "a construction inconsistent therewith," a different and narrower standard of the new Board members' own devising. The distinction suggested not only reveals indifference to denial of substantive rights which may result from differ-

5. Ratner, *Problems of Federal-State Jurisdiction in Labor Relations*, New York University Fifth Annual Conference on Labor (Matthew Bender & Co., 1952), pp. 77, 112.

6. *Ibid*, at p. 114.

ences in "construction" of corresponding substantive rules; it ignores the fact, demonstrated in our main brief, pp. 55-59; 69-72, that Congress considered equally vital to the national welfare those objectives which it attempted to achieve through procedural limitations as those which it attempted to achieve through the creation of substantive rights.

The Board's brief says (pp. 20, 46) that Ohio in the *Fairlawn* case has infringed no substantive rights despite the fact that Ohio offers no protection whatever for any of the employee and union rights to organize and peacefully to picket which the national Act protects. See our main brief, pp. 42-55, 69-70; Brief for the United Steelworkers of America in No. 280, pp. 28-35. The new Board majority is undisturbed by the fact that Ohio treats all peaceful picketing for organizational purposes as a "conspiracy," and consequently, in this case, enjoined *all* picketing, even though, if the National Board had handled this case, and found the Union's objective illegal, it would have limited its order so as to permit peaceful picketing for organizational purposes. See our main brief, pp. 48-55. It is similarly undisturbed (Brief, p. 4, note 4), by the fact that the Ohio courts predicated one of the findings upon which the conclusion of illegality rested—that the Union at all times lacked a majority—upon Fairlawn's unfair labor practices, and the other finding—that the Union's object was to obtain a union shop clause—upon evidence which the Board would not regard as warranting that conclusion. See our main brief, pp. 45-48. The language of the Section 10(a) proviso shows that Congress realized, as the present Board majority does not, that it cannot be enough that no conflict appear on the face of the state law or policy; differences in construction or application of rules identically worded may produce results

as destructive of substantive rights as differences in the rules themselves.

The distinction proposed by the Board's brief would permit the states to vitiate, among others, Congress' policies designed to eliminate Communist officers from the trade union movement and to avoid the exacerbation of labor disputes inevitably caused by the granting of injunctive relief to private employers. For a number of years the Republican administration has proposed that Congress eliminate the consistency requirement of the proviso, so that states could assert jurisdiction under inconsistent laws where the Board declined to assert jurisdiction, despite the frustration of important federal policies which that would entail. See Brief for the AFL-CIO, *amicus curiae*, pp. 20-22; Brief for the United Steelworkers of America in No. 280, p. 27; Brief for the NLRB, p. 38, note 22. Thus far that solution has not commended itself to Congress, presumably for the same reasons which led the "watchdog committee" of the 80th Congress to reject it. See our main brief, pp. 79-81.

The Board's brief is, therefore, a blatant attempt to induce this Court to effectuate the very political program which this Administration has tried, unsuccessfully, to achieve through legislation. This brief is the second step, the first having been the *Breeding* case, of the Republican majority's plan to relinquish "a field for the exercise of the states reserved powers." Brief for 7 States, p. 17. But Congress in the Act decided "what matters are to be taken over by the central Government and what to be left to the States." See our main brief, pp. 23-24, 30-31. The attempt of a majority of the Board to draw a new and different line for political reasons is a perversion of the administrative process. Its attempt to rewrite legis-

lative history for the purpose of inducing this Court to approve its political program is an abuse of the judicial process.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1955.

No. 728.

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, LOCAL NO. 427, AFL, *et al.*,

Petitioners,

vs.

FAIRLAWN MEATS, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES.

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INDEX.

History of Proceedings in the State Courts of Ohio ... 1

Facts Concerning Employer's Business ... 5

Discussion of Authorities ... 7

Conclusion ... 20

AUTHORITIES CITED.

Cases.

Algoma Plywood vs. Wisconsin Board; 336 U. S. 301 12

W. E. Anderson Sons Co. vs. Local Union No. 311, 156 Ohio State 541 ... 2

M. L. Ashburn, 88 N. L. R. B. 286 ... 18

Betty and Bert Millage, 87 N. L. R. B. 248 ... 19

Brandeis vs. National Labor Relations Board, 142 F. 2d 977, cert. den. 323 U. S. 751 ... 12

Building Trades Council vs. Kinard Construction Company, 346 U. S. 933 ... 12

Bus Employees vs. Wisconsin Board, 340 U. S. 383 ... 12

Clothing Workers vs. Richman Bros. Company, 348 U. S. 511 ... 12

Consolidated Edison vs. National Labor Relations Board, 305 U. S. 197 ... 17, 19

Crosby vs. Rath, 136 Ohio State 352 ... 2, 9, 10

Federal Dairy Company, 91 N. L. R. B. 638 ... 18

Garman vs. San Diego Building Trades Council, 291 Pac. (2d) 1 ... 10

Garner vs. Teamsters Union, 346 U. S. 485 ... 4, 12, 13, 17

Grimes and Hauer, Inc. vs. Pollock, 163 Ohio State 372, 350 U. S. 900 ... 4, 13

Hague vs. C. I. O., 307 U. S. 515 7

Harold and Sons, 82 N. L. R. B. 174 19

Hill vs. Florida, 325 U. S. 538 13

International Rice Milling Company vs. National Labor Relations Board, 341 U. S. 665 13

International Union vs. O'Brien, 339 U. S. 454 13

Kobritz, 153 Fed. (2d) 8 18

Labor Board vs. Seven-Up Company, 344 U. S. 344 15

Local Union No. 10 vs. Graham, 73 Sup. Ct. 585 15

Marsh vs. Alabama, 326 U. S. 501 13

May Potato Chips, 86 N. L. R. B. 191 18

Mine Workers vs. Coronado, 259 U. S. 344 15

National Labor Relations Board vs. Denver Building Council, 341 U. S. 675 13

National Labor Relations Board vs. Fainblatt, 306 U. S. 601 14

National Labor Relations Board vs. Fansteel Metallurgical Corporation, 306 U. S. 240 8

National Labor Relations Board vs. J. L. Hudson, 135 Fed. (2d) 380 19

Retail Clerks Local No. 1564 vs. Your Food Stores, 225 Fed. (2d) 659 11

Santa Cruz Company vs. Labor Board, 303 U. S. 444 15

United Hatters, 208 U. S. 274 15

Statutes.

Ohio Revised Code Section 2505.31 3

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES.

HISTORY OF PROCEEDINGS IN THE STATE COURTS OF OHIO.

On February 8, 1954, Fairlawn Meats, Inc., an Ohio corporation, employing fifty (50) people in three (3) retail meat stores, filed its petition for injunction against the Butchers Local Union in Akron, Ohio.

The Union removed the cause to the United States District Court for the Northern District of Ohio and on the motion of Fairlawn Meats, Inc. to remand, on March 18, 1954, the United States District Court found "that there are no allegations made in the plaintiff's petition showing a Federal question, or from which a Federal question may be inferred, and, therefore, finds this Court is without jurisdiction, and hereby sustains the motion to remand."

The Union then filed an amended answer, admitting the corporate structure and location of the stores. All

other allegations were denied. It also set up the defense of lack of jurisdiction of the Common Pleas Court and the further defense of estoppel by reason of a stipulation signed May 10, 1952.

Fairlawn filed its reply, alleging the stipulation was without consideration, and denied that the National Labor Relations Board had sole and exclusive jurisdiction.

On the issues thus made, the case went to trial in the Common Pleas Court. Both parties offered many witnesses and after the matter was fully gone into, judgment was rendered in Fairlawn's favor.

The Union then filed its appeal to the Court of Appeals of Summit County, Ohio, where by stipulation of the parties, the Union's appeal on questions of law and fact was heard on the record of the evidence in the Court of Common Pleas. The Court of Appeals hearing the cause de novo made its findings of fact as well as law. On all the evidence received, it found among other things:

(a) "that there is no burden placed upon, or obstruction of, interstate commerce by any action taken by the parties to this case." and

(b) "therefore, that the state courts have jurisdiction to hear the case."

(c) "the picketing was for organizational purposes only, and not to secure a settlement of grievances."

(d) the picketing in part was done on land owned by or under lease to Fairlawn.

It, therefore, concluded that under the announced policy in Ohio as set forth by Ohio Supreme Court in *Crosby v. Rath,* 136 Ohio State 352, and in *W. E. Anderson Sons Co v. Local Union No. 311,* 156 Ohio State 541, that injunction should be granted and it so ordered on June 4, 1955.

From this Order, the Union filed its motion in the Ohio Supreme Court to certify the record and appeal as of right. In the Ohio Supreme Court the Union raised two questions only, both on its motion to certify and for a rehearing. As stated by the Union, these questions are:

> (1) Is peaceful picketing for a lawful objective, arising out of a bona fide trade dispute between an employer and a union representing its employees subject to injunctive restraint? and
>
> (2) Is the controversy of a corporate employer engaged in an industry and in a labor dispute affecting commerce, seeking injunctive relief against a union to restrain peaceful picketing, alleged in fact, and to be for a purpose violative of the Act within the exclusive jurisdiction of the National Labor Relations Board?

In both questions, the Union presented to the Ohio Supreme Court ingredients which have been resolved against the Union by the findings of the two trial courts after hearing all the testimony and evidence. By Ohio Revised Code Section 2505.31, it is provided the Supreme Court of Ohio is not required to determine as to the weight of the evidence, and, consequently, the established practice is for the Court to refuse to weigh the evidence:

> (a) To determine its sufficiency, or
>
> (b) To determine where the preponderance lies, or
>
> (c) To determine whether correct conclusions as to the facts were reached by the Court below.

On November 9, 1955, the Supreme Court of Ohio found no debatable constitutional question was involved and denied the motion to certify. The Union then filed a motion for rehearing in which it states the questions involved are:

(1) In refusing appeal this Court allows a Court of Appeals decision to stand which is in conflict with *Grimes and Hauer, Inc. vs. Pollock, et al.*, 163 Ohio State 372, in controversies coming within the provisions of the National Labor Relations Board and which affect commerce.

(2) In refusing appeal this Court allows a Court of Appeals decision to stand which denies to employees the right to strike to redress their grievances with their own employer.

(3) In refusing the appeal this Court allows the erroneous judgment of the lower court to stand on matters of great public interest and concern without settling important questions of Ohio law presented by this appeal.

Here, again the Union seeks answers to questions not before the Court. In the *Grimes* case, *supra*, the petition of Grimes and Hauer, Inc. alleged it was involved in interstate commerce. The Supreme Court of Ohio followed the *Garner* case in this Court in reaching its decision in *Grimes and Hauer, Inc.*, but in the case at bar, the Federal Court and two trial courts found as a fact no Federal question was involved.

Consequently, the Ohio Supreme Court was entirely correct in stating that no debatable constitutional question was involved. Furthermore, the "right to strike" was in no manner, at any time, a question before the Federal or State Courts and when the Union presented for the first time the question of right to strike on a rehearing motion, the Ohio Supreme Court was clearly correct in denying the motion for rehearing. Particularly so, in view of the fact that no order of any kind on this subject had been made.

FACTS CONCERNING EMPLOYER'S BUSINESS.

1. Fairlawn Meats, Inc. is an Ohio corporation, whose sole stockholders are Burdett H. Ekers and Nina E. Ekers, husband and wife, residents of Summit County, Ohio. The Company is not licensed to do business in any other state and is not a subsidiary of any other company or corporation.

2. The respondent employs fifty (50) men and women in the operation of *retail* selling food products, consisting of fish, fowl, meat, bread and groceries. For this purpose, two storerooms are leased and one owned in Summit County, Ohio:

(1) 278 West Avenue, Tallmadge, Ohio

(2) 2246 West Market Street, Akron, Ohio

(3) At junction of United States Route Number 21 and State Route Number 176 in West Richfield, Ohio.

Its purchases are all made within the State of Ohio. It has no mail order business and its entire sales are made within the State of Ohio. In excess of sixty-five (65) per cent of the sales are across the counters of the stores, the balance being delivered to restaurants or markets within the environs of Summit and Cuyahoga Counties, Ohio. Plaintiff does no butchering and does not have any Federal meat inspection. No warehouses are involved.

3. The following companies originate their shipments to respondent from points wholly within the State of Ohio:

Allied Wholesale	Superior
Akron Poultry	Akron Packing
Capital City Products	Canton Provision
Alex Fair	Swift and Company
Schwenger-Klein	Slade-Gorton
Myers	Sucher
Lee Anodic and Son	Warsaw Sausage

Tasty Pure Food	Armour
Pringles Meats	Ritchie
Christ Wengel	Hildebrandt
Copley Pack	Klein Sea Foods
Pesta Foods	David Davies
Kent Provision	Olesky
Galat Packing	Lee Meats
Petit	Five Points Poultry
Sugardale	Telling Ice Cream
Peerless	Glen Brook Foods
Gibbs	Aster Meats

and many others. The purchases from these firms wholly within the State of Ohio are Seven Hundred Fifty Three Thousand Ninety Nine Dollars and Ninety Four Cents ($753,099.94) annually.

4. In addition thereto, the following packing houses ship to plaintiff from without the State of Ohio:

International Mineral	Hormel and Company
Griffith Laboratories	Wilson and Company
Hafner Coffee	Hunter Packing
Case International	B. Heller
Rath Packing Company	Oscar Mayer
Marhofer Packing Company	Dubuque Packing
Miller and Miller	Cudahy

The foregoing packers maintain a local representative in Summit County, Ohio. These representatives call upon plaintiff at its stores, at which points orders are placed by plaintiff for meat. Shipments are then made, freight paid by shipper, on those orders by way of rail or truck to plaintiff's stores, at which points checks are issued locally to the packers' representatives and the proceeds thereof banked in Akron banks to the packers' account by the packers' representatives.

5. The Company reports to the Bureau of Unemployment Compensation of Ohio, contributes to the State Work-

men's Compensation Fund, but reports only tax reports and Social Security to the Federal Government.

6. Advertising for sale of respondent's foods is made wholly in the Akron Beacon Journal. No advertising is done on a State or National scale and no radio or television medium is used.

DISCUSSION OF AUTHORITIES.

The Union, in this Court, brings attention to various articles on "Shopping Centers" in the suburbs of American cities. The case at bar does not involve a shopping center. There is no dispute that Fairlawn's stores were either owned in fee or on leased lands in proximity of shopping centers and that this proximity as in all similar cases is furnishing a competition that is rapidly diminishing its business to the extent that at this time only one of the three original stores remains in business.

The right to picket as constituting a privilege bestowed upon a citizen by the Constitution has been the subject of consideration by this Court many times. We would here for the moment not become involved in the right, but discuss rather the "*place* of picketing." It has been quite well understood that the employer in no instance is required to furnish the picketeer a place to march or a platform from which he might exercise his freedom of speech.

This Court in *Hague vs. C. I. O.*, 307 U. S. 515, held the privilege of a citizen of the United States to use the *streets* (emphasis ours) for communication of views on national questions may be relegated in the interest of all; it is not absolute, but relative and must be exercised in subordination to the general comfort and convenience and in consonance with peace and order; but it must not in the guise of regulation be abridged or denied.

Picketing *at* the situs of a labor dispute offers no reason for picketing *on* the premises of the employer. A question has arisen at times where the Court is asked to rule on picketing away from the situs of the labor dispute. One may picket at the employer's place of business but not on his premises. Otherwise, pickets could leave the street, enter the gates of factories and through the doors of stores and march up and down the aisles with their banners. To permit such conduct would return us to the days of the "sit down strike," where the picketeer took over and reduced the employer's property to his possession. This has been uniformly outlawed by state and federal Courts and final word was received from this Court when it spoke in *National Labor Relations Board vs. Fansteel Metallurgical Corporation,* 306 U. S. 240.

The usual picketing scene anywhere presents conditions, which are quite different from the views expressed and hopes to be attained by the picket. While the right of free speech may permit the marching to and fro *before* my premises with a banner containing assertions that I am "unfair to organized labor," certainly it does not permit the marching to and fro *upon* my premises. The Labor Management Relations Act prevents interference by the employer with the right of employees to organize and bargain collectively, but it does not require him to furnish the forum or the platform from which the employee may exercise his right to organize and his right to free speech except when the employer refuses to give a rival union the privilege he has voluntarily extended to a union he favors.

Traditionally State Courts have had and have exercised their full jurisdiction to enjoin trespass. No matter how peaceful and lawful in purpose and conduct picketing may be, it is enjoinable when conducted *on* the property

of the employer and not on the public streets or places where the picket has the right to be.

In the State Court proceeding, the following propositions govern:

(1) The trial courts had the inherent right to pass upon the facts and determine the jurisdiction of the matters before it.

(2) The Ohio Supreme Court will not weigh the evidence.

(3) Since each case of picketing must be determined on its own facts, there is no necessity for the Ohio Supreme Court to further clarify its position.

(4) No conflict existed between the decision of the Court of Appeals of Summit, Mahoning and Butler Counties.

Crosby vs. Rath is the law of Ohio governing picketing in a business which does not affect commerce and has not been modified by the many decisions of this Court on this subject. By many it was thought that inasmuch as there was violence in the picketing in the *Crosby* case, that certiorari was refused and that when the violence ceased, the United States Supreme Court would grant certiorari. Following denial of the first petition for certiorari in the *Crosby* case, the Union filed its motion to modify the decree so as to permit peaceful picketing because all violence, and in fact, all picketing in its effect had ceased for three years.

A second petition for a writ of certiorari was filed and the Union argued that all violence had ceased and that the forbiddance of peaceful picketing by an Ohio Court was violating the right of free speech. It was argued that the defendants were in the same position as were the defendants in the *Senn* and *Swing* cases and that if the United States Supreme Court denied certiorari as to violence in

the *Meadowmoor* case, then the *Crosby* decree must be modified so as to permit peaceful picketing. This second petition for a writ was denied May 25, 1942 (136 U. S. 688).

The California Court has more recently held in *Garmon vs. San Diego Building Trades Council*, 291 Pac. (2d) 1, that in an action in the state court to enjoin picketing the evidence supported the finding that the purpose of the picketing was not to induce the employees to join, but to compel the employer to sign an agreement requiring union membership or suffer destruction of the business. In the case at bar, the trial court found that the purpose of picketing was to coerce the employer into signing an agreement requiring union membership. Now the mere fact that the acts and conduct of a purely local business may constitute acts and conduct which if engaged in an interstate commerce business would be an unfair labor practice under the Act, does not exclude the State Courts from calling the act and conduct which it is under the State law and enjoin its further perpetration.

The numerous cases cited by the Union on the question of jurisdiction deal with the enforcement of the Board's order. Having assumed jurisdiction, the decision of the Board reached by the facts as to the *jurisdiction* of the Board has been upheld by the Federal Courts and by this Court. With these decisions we have no quarrel.

With equal sincerity we maintain the decision of a court of last resort in a state as to its finding of facts bearing on jurisdiction deserves the same respect and is binding unless it clearly conflicts with a Federal statute or decision. Certainly, we may not expect that State Courts will take jurisdiction where they should not any more than we should expect the Labor Board to refuse to take jurisdic-

tion. In any event, this case does not present a conflict with any Federal Act or decision and is not the enforcement of any state provisions which have been preempted by Federal legislation nor in asserting a concurrent jurisdiction with the Federal Government.

Retail Clerks Local No. 1564 vs. Your Food Stores, 225 Fed. (2d) 659, helps Fairlawn rather than the Union. In this case the employer filed suit in the state court seeking an injunction against compulsion to engage in an unfair labor practice. Thus he pleaded himself out of court in the very beginning. But the State Court action was removed to the Federal Court along with the temporary injunction which had been issued. No motion to remand was filed, but the Union's motion to dismiss the petition and temporary order was granted on the ground the United States District Court had no jurisdiction. The National Labor Relations Board refused jurisdiction because interstate operations did not meet the standards for the assertion of jurisdiction. Then the employer filed his second suit in the State Court based on trespass. The defense of res adjudicata was sustained. On page 663, the Court said:

> "By the motion to dismiss and dissolve the temporary restraining order, the question of both state and federal jurisdiction was placed at issue and the subsequent dismissal amounted to an adjudication of this jurisdictional feature."

In this connection, it is well to note that in the case at bar, on the motion to remand, the Court sustained the motion on the ground the Federal Court had no jurisdiction. Is this res adjudicata? The only difference seems to be that in the *Retail Clerks* case, the order is final from which appeal may be made and in the case at bar, the order to remand is not appealable to the Circuit Court.

In *Clothing Workers vs. Richman Bros. Company*, 348 U. S. 511, a question of right of a Federal Court to enjoin proceedings in a state court was raised resulting in this Court holding the Federal Court had no such power.

Algoma Plywood Company vs. Wisconsin Board, 336 U. S. 301, presents facts where the employer is admittedly a manufacturer producing goods for interstate commerce in a plant in which the National Labor Relations Board had certified the Union as bargaining representative after a Board decision. No question of jurisdiction could be sincerely urged.

Likewise in *Bus Employees vs. Wisconsin Board*, 340 U. S. 383, the Railway Company was clearly engaged in interstate commerce. A union shop election had been conducted by the National Labor Relations Board after a representative election was held.

In *Brandeis vs. National Labor Relations Board*, 142 F. 2d 977, certiorari denied 323 U. S. 751, the Eighth Circuit sustained the National Labor Relations Board's position that it had jurisdiction under the Act where seventy-five (75) per cent of the merchandise purchased and shipped to the employer engaged in Eight Million Five Hundred Thousand Dollar ($8,500,000) business and did affect the flow of interstate commerce.

In *Building Trades Council vs. Kinard Construction Company*, this Court granted certiorari and reversed the State Court, 346 U. S. 933 (January 18, 1954). This Court followed *Garner v. Teamsters Union*, but did not pass upon the question whether the State Court could grant its own relief should the Board decline to exercise its jurisdiction. The effect on interstate commerce was unquestioned.

In *Garner vs. Teamsters Union*, 346 U. S. 485, again admittedly:

> "Petitioners were engaged in Pennsylvania in an interstate trucking business."

In *Grimes & Hauer, Inc. v. Pollock*, 163 O. S. 372, 350 U. S. 900, again admittedly Grimes & Hauer, Inc. were engaged in interstate commerce by the allegations of plaintiff's petition.

In *Hill v. Florida*, 325 U. S. 538 (June 11, 1945), the Florida Statute attempted to license a union "business agent," and ran afoul of the National Labor Relations Act, by being wholly inconsistent with the "full freedom of choice of collective bargaining agents" and attempted to fix the agents functioning by conditions fixed by Florida.

In *International Rice Milling Co. v. National Labor Relations Board*, 341 U. S. 665, the mill was engaged in interstate commerce and the question involved was "did the conduct violate the secondary boycott provisions of the Act."

In *International Union vs. O'Brien*, 339 U. S. 454 (May 8, 1954), the problem is the Strike Vote provisions of the Michigan Mediation Law. This Court found they were in conflict with the National Labor Relations Act and are therefore invalid under the Commerce Clause of the Federal Constitution.

Marsh vs. Alabama, 326 U. S. 501 (January 7, 1946), presents the proposition that a state may not remove the freedom of religion and the press by legislation inconsistent with the First and Fourteenth Amendments of the Federal Constitution.

In *National Labor Relations Board vs. Denver Building Council*, 341 U. S. 675 (June 4, 1951), purchases were

Eighty-six Thousand Five Hundred Dollars ($86,500.00) raw materials of which Fifty-five Thousand Seven Hundred Forty-five Dollars ($55,745.00) were from out of the state. Both the Board and the Court of Appeals found the strike affected commerce. This Court said:

> "de minimuo non curat lex did not require the Board to refuse jurisdiction. The Board's findings on the questions of fact are conclusive."
>
> "Activities complained of must affect interstate commerce in order to bring them within the jurisdiction of the Board. The Board here found that their effect was sufficient to sustain its jurisdiction."

National Labor Relations Board vs. Fainblatt, 306 U. S. 601 (April 17, 1938). This is a case, where the Board had taken jurisdiction, issued its complaint, conducted a hearing, resulting in a decision. Commerce was affected. Respondents are located in New Jersey. Materials were furnished by a partnership located in New York City; cloth was cut in New York, shipped to New Jersey; suits were made up in New Jersey and shipped back to New York, and were sold out of New York to customers throughout the United States.

At page 605, the Court said:

> "Here interstate commerce was involved in the transportation of the materials to be processed across state lines to the factory of the respondent and in the transportation of the finished products to points outside the state for distribution to purchaser and ultimate consumers."

At page 606:

> "Transportation alone across state lines is commerce within the Constitutional control of the national government and subject to the regulatory power of Congress—"

and,

"it extends to all such commerce be it great or small."

Labor Board vs. Seven-Up Company, 344 U. S. 344 (January 12, 1953). Here the National Labor Relations Board issued a complaint, conducted a hearing and computed back pay in a discriminatory discharge matter. The Company could not raise the objection based on seasonable nature of its business before this Court when it had not urged it before the Court of Appeals or Board.

In *Santa Cruz Company vs. Labor Board*, 303 U. S. 444, decided March 28, 1938, the Corporation canned fruit raised in the state and disposed of thirty-seven percent (37%) of its output beyond the State. National Labor Relations Board accepted a charge and issued a complaint and order regarding discharged employees.

The Court quite properly held the strike would prevent sales which were made outside the State.

But in the case at bar, the strike would be to prevent sales to ultimate consumers wholly in Ohio by a retailer in Ohio, who makes no sales outside the State of Ohio.

United Hatters, 208 U. S. 274, is aimed at the destruction of *interstate* trade in manufactured hats.

Mine Workers vs. Coronado, 259 U. S. 344. Coal Mining is not a case of interstate commerce, but in the Second Case, 268 U. S. 295, evidence was adequate to show the purpose was to stop production of non-union coal and prevent its shipment to other states. This rule is for manufacturers and processors.

The Supreme Court, in *Local Union No. 10 v. Graham*, 73 Sup. Ct. 585, decided March 16, 1953, granted certiorari "because of the importance of the issue in the practical administration of labor law," page 587 of the Opinion. Although the extent of the damage was only $190.00, the

Court said that the picketing was "for aims, purposes and objectives in conflict with the provisions of the Right to Work laws of the State of Virginia, and therefore, illegal."

"Picketing—May be enjoined if purpose is in violation of state law—Local Union No. 10 v. Graham, 73 S. Ct. 585. General contractor, under contract with City of Richmond, to construct high school, complained that defendants picketed the plant in admittedly peaceful fashion, to induce said contractor to take action in violation of the Virginia Right to Work Statute by precluding non-union employees on the job. Affirming the Supreme Court of Appeals in Virginia in sustaining an injunction issued by the Trial Court, a 7-justice majority opinion, Mr. Justice Burton, held, that the evidence justified the trial court's finding that the enjoined picketing was for purposes in conflict with the Virginia Right to Work Statute and that Virginia could, consistently with the Fourteenth Amendment to the Federal Constitution, enjoin peaceful picketing when carried on for purposes in conflict with that statute. The Court felt that the result followed from the 'reasoning and authority of many prior cases which it reaffirmed, including Giboney v. Empire Storage Co., 69 S. Ct. 684, 336 U. S. 490, 93 L. Ed. 834, and others. Mr. Justice Black dissented without opinion, and Mr. Justice Douglas wrote a dissenting opinion, being willing to confirm the State's police power as established in the above case but unwilling to support the broad injunction in the instant case.'

"Picketing—No appeal from State Court's temporary injunction—*Montgomery Bldg. and Construction T. C. vs. Ledbetter Erection Co.*, 73 S. Ct. 196. A-72 majority, Mr. Justice Minton refused to review temporary injunction order of Supreme Court of Alabama issued to enjoin certain picketing activities, wholly peaceful, by petitioner labor organizations reasoning that the Court could review on certiorari only a 'final judgment or decree' under 28 United States Code

Annotated Section 1257. The majority said that the argument that 'to await the outcome of the final hearing is to moot the question and to frustrate the picketing,' however appealing, 'does not warrant us in enlarging our jurisdiction. Only Congress can do that.' Mr. Justice Douglas, with whom Mr. Justice Black concurred, dissented, saying, 'Unless the rule of finality is to be purely mechanical, which to date it has not been * * * we should determine now whether the National Labor Relations Act permits a state court to interfere with a labor controversy in a way which, though interim in form, irretrievably alters the status of the dispute or in fact settles it.'"

Neither *Graham* nor *Ledbetter* cases, decided shortly before the *Garner* case, were overruled by the *Garner* case.

In an early case, the Supreme Court of the United States in *Consolidated Edison v. National Labor Relations Board,* 305 U. S. 197 (1938) held the mere fact one is a retailer does not exempt one from the operation of the Labor Relations Act; nor is the question simply one of engaging in interstate commerce but rather is will the existing strife result in "*substantial interference* to or interference with the free flow of commerce." Thus we are confronted with the much broader scope of the interstate commerce problem than was experienced by the Court and counsel when the law professors taught the subject to us more than thirty years ago. Be that as it may, the National Labor Relations Board, cognizant of this pronouncement and dealing with the broader problem: "affecting interstate commerce" has established certain principles and criterion to deal with this question. They recognized that, even under the principles pronounced Congress had not taken the entire area of labor relations and preempted it for the jurisdiction of the Board. They are limited to em-

ployers and employees, whose activities substantially interfere with interstate commerce.

The Labor Board has, therefore, adopted a "Volume of Business Test" to each set of facts in dealing with the question. This is not based on budgetary considerations. They say that where the "direct interstate purchases are less than One Million Dollars ($1,000,000.00) annually" or "Two Million Dollars ($2,000,000.00) in indirect interstate purchases," where the interstate sales do not exceed Fifty Thousand Dollars ($50,000.00), jurisdiction will not be assumed or taken. On this basis they declined jurisdiction in the case of:

Federal Dairy Company, 91 N. L. R. B. 638, decided October 3, 1952,

with the words: "We decline jurisdiction where the direct inflow is less than Five Hundred Thousand Dollars ($500,000.00) annually."

Applying the same rule in the *Kobritz* case, 153 Fed. (2d) 8, in 1951, they stated, "meat and allied products in excess of One Million Dollars ($1,000,000.00) from outside the state gives the Board jurisdiction." In this case, Kobritz was a *wholesale purchaser* and *distributor* of meat and provisions, purchasing annually One Million, One Hundred Seventy-eight Thousand, Six Hundred Sixty-seven Dollars and Twenty-eight Cents ($1,178,667.28) worth of provisions shipped to it by rail and truck from points outside the State of Maine.

On the basis of the relative remoteness on the impact on interstate commerce, they declined to take jurisdiction in:

M. L. Ashburn, 88 N. L. R. B. 286
(Sale of oysters);
May Potato Chips, 86 N. L. R. B. 191
(Potato Chip Manufacturing);

Harold and Sons, 82 N. L. R. B. 174
(Poultry and eggs);
Betty and Bert Millage, 87 N. L. R. B. 248
(Food Store).

The enormity of the inflow is recognized in a Sixth Circuit Court case, *National Labor Relations Board vs. J. L. Hudson*, 135 Fed. (2) 380. J. L. Hudson Company is one of Detroit's largest department stores. As described by the Board and Court, it is "enormous"; five warehouses are involved; 3562 employees; expansive *public* service; more than Thirty-five Million Dollars ($35,000,000.00) of its Forty-three Million, Six Hundred Eighty-four Thousand, Two Hundred Eighty-nine Dollars ($43,684,289.00) annual purchases came from outside the state; its products came from all parts of the world to suit the taste of the most fastidious to the most lowly section hand; it had a mail order department which shipped to all states a very substantial dollar volume; and its sales totaled over Seventy-one Million, Six Hundred Eighty-nine Thousand, Seven Hundred Thirty-seven Dollars ($71,689,737.00). impact of the closing of an operation of this type upon interstate commerce is apparent.

These landmarks indicate that the Board and the Courts do not attempt to single out the small operator and apply a hard rule to bring him within its jurisdiction. Furthermore, the Labor laws contemplate a "substantial interference with interstate commerce." Where this is lacking, the little fellow must seek his relief in the tribunals of his state and community. This is a just and good rule.

The United States Supreme Court in the *Consolidated Edison* case, *supra*, pronounced the old adage that in cases in which the question of interstate commerce arises each tub must set on its own bottom, or each individual case

must be decided on the facts of that case. Applying this thought to the case at bar, truly the plaintiff is not engaged in interstate commerce and interstate commerce is not affected.

CONCLUSION.

The mere assertion of the Union that Ekers is in interstate commerce was insufficient. The trial court decided this question adversely to the Union on the evidence presented, and did so by applying the ordinary rule of proof by a preponderance of the evidence.

We have pointed out the fact regarding the National Labor Relations Board cases because the *Board has taken jurisdiction* in the cases referred to and were in Court to protect that jurisdiction and the orders they made pursuant thereto. But here as stated *supra*, the Union does not seek the Board's jurisdiction, but boycott the very agency, which they claim ousts the jurisdiction of the trial Court. As Judge McNamee of the Federal Court said, "you present the anomalous position in Federal Court of *asking* this Court to take *jurisdiction* in order that you might then *ask* me to dismiss the petition on the ground the Court *does not have* jurisdiction."

It appears to us that it is most illogical to claim that because an Ohio meat packer bought a steer in Wisconsin which was shipped to Ohio and butchered in Ohio and sold here, that without showing the butchered steer came to rest on Ekers' counter, Ekers will affect interstate commerce if he ceases to buy from this particular packer because of a strike.

Furthermore, the type of business is to be considered. A retail store selling food only locally is distinguishable from a manufacturing employer, shipping his manufactured product to another state or from a telephone com-

pany providing property protection service by means of a group of corporate subsidiaries engaged in providing similar services in several states.

The undisputed facts showed the trial Courts clearly that whether Ekers makes his employees join the Union by signing the proposed Union Contract, or maintains he has no right to do so and, therefore, will not force them into the Butchers Union will have *no* impact, effect or relation to or on the business of the packers, or the steer-raising farmers of other states.

The Writ should be denied.

Respectfully submitted,

STANLEY DENLINGER,

Counsel for Respondent.

Office
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JOHN T. FEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1956.

No. 41.

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, LOCAL NO. 427, A. F. L., *et al.*,

Petitioners,

vs.

FAIRLAWN MEATS, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

BRIEF OF RESPONDENT.

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TABLE OF CONTENTS.

Questions Presented 1

Statement of the Facts 2

A. The Pleadings and the Trials 2

B. The Parties 6

Plaintiff-Respondent 6

The Defendants-Petitioners 8

C. Plaintiff's Relation With Its Employees 9

D. The Conduct of the Defendants-Petitioners 12

Summary of Argument 16

Argument:

Jurisdiction of the State Court 21

This Court Has Never Directly Decided This Issue, But In Several Cases Has Indicated That State Jurisdiction Could Properly Be Exercised to Provide Due Process of Law 31

Assuming That the Instant Controversy Affects Commerce Within the Meaning of the National Labor Relations Act, Since the National Labor Relations Board Would Decline to Exercise Jurisdiction Here, the State Court Correctly Concluded That It Had Jurisdiction of the Case 35

A. The Case Here Is One that Does Not Fall Within the Board's Announced Jurisdictional Standard, and the Board Would Therefore Decline Jurisdiction 36

B. Since the Board Would Decline Jurisdiction Herein the State Court Had Jurisdiction to Decide the Issues 39

1. Under Settled Principles, No Basis Exists for Implying the Exclusion of State Power 40

2. The Principle Underlying the Exclusion of State Power Is In Conflict With Federal Authority and No Possibility of Such Conflict Exists Where the National Board Declines Jurisdiction Altogether 43

3. The Action of the State Court Here Was Consistent With Federal Policy as Set Forth in the National Act 46

4. The Decided Cases Show that the State Court Had Jurisdiction to Proceed Here 49

a. Court Decisions 49

b. State Labor Board Decisions 54

5. If State Court Jurisdiction is Barred Under the Circumstances of This Case the Necessary Effect Is to Compel the National Board to Abandon Its Jurisdictional Standards and Accept Jurisdiction in All Cases Covered by the National Labor Relations Act Regardless of How Minor the Impact on Interstate Commerce. The Result of This Would Be to Cause a Frustration of the Proper Administration of the National Labor Relations Act 56

6. Erroneous Arguments of Petitioners 59

Petitioners Propose an Unconstitutional Interpretation of the Act Contrary to the Decisions of This Court and Completely Fail to Justify the Denial of Due Process That Would Result 75

Conclusion 78

APPENDICES:

A. N. L. R. B. Jurisdictional Standards—1950 ... 79

B. N. L. R. B. Jurisdictional Standards—1954 ... 81

TABLE OF AUTHORITIES.

Cases.

Adams Dairy v. Dairy Employees Union (Mo.), 38 LRRM 2404 ... 45

Aetna Freight Lines v. Clayton, 228 F. (2d) 384 (C. C. A. 2) ... 45

Aladdin Industries v. Associated Transport (Tenn. App), 38 LRRM 2599 ... 42, 46

Algoma P. & V. Co. v. W. E. R. B., 336 U. S. 301, 93 L. Ed. 691, 69 S. Ct. 584 ... 31, 32-33, 34, 65

Allen Bradley Local v. Wisconsin Employment Relations Board, 315 U. S. 740 ... 17, 40, 41, 55

All Hotel Members of Miami Beach Hotel Association, 36 LRRM 1447 ... 61

Amalgamated Ass'n. etc. v. Wisconsin Employment Relations Board, 340 U. S. 383 ... 74

Amalgamated Clothing Workers v. Richman Bros., 348 U. S. 511, 99 L. Ed. 600, 75 S. Ct. 452 ... 16, 31, 77-78

Amazon Cotton Mills Co. v. Textile Workers Union, 167 F. (2d) 183 (C. C. A. 4) ... 45, 59

Anderson v. Retail Clerks Local No. 698, 30 Labor Cases ¶ 70158 ... 48

Armour v. Wantock, 323 U. S. 126 ... 73

Ashland Motor Co., 37 LRRM 1116 ... 54

Bellaire v. B. & W. Ferry Co., 105 O. S. 247 ... 28

Benz v. Compania Naviera Hidalgo, 233 F. (2d) 62 (C. C. A. 9) ---- 42

Bethlehem Steel Co. v. N. Y. S. L. R. B., 330 U. S. 767, 91 L. Ed. 1234, 67 S. Ct., 1026 ---- 17, 19, 20, 31, 33, 40, 41, 42, 43, 54, 65, 66

Blanche v. New York Central Railroad Company, 103 O. S. 471 ---- 28

Born v. Laube, 213 F. (2d) 407, *reh'g. den.* 214 F. (2d) 349 (C. C. A. 9), *cert. den.* 348 U. S. 855, *reh'g. den.* 348 U. S. 932 ---- 45

Breeding Transfer Company, 110 NLRB 493, 35 LRRM 1020 ---- 17, 37, 42, 63, 65

Brooks v. N. L. R. B., 348 U. S. 96 ---- 39, 57

Building Service Employees International Union v. Gazzam, 339 U. S. 532 ---- 18, 48

Building Trades Council v. Kinard, 346 U. S. 933, 98 L. Ed. 423 ---- 16, 33, 35, 37

Building Trades Council of Reno v. Bonito (Nev.), 280 P. (2d) 295, 35 LRRM 2600 ---- 51

Cain, Brogden & Cain v. Teamsters (Tex.), 285 S. W. (2) 942, 37 LRRM 2298 ---- 51

Capital Service v. National Labor Relations Board, 204 F. (2d) 848 (C. C. A. 9) ---- 53-54

Cavett v. Machinists, District Lodge 34, 30 Labor Cases ¶ 70161 ---- 48, 49

East Newark Realty Corp., 115 NLRB No. 75, 37 LRRM 1328 ---- 61

Garmon v. San Diego Building Trades Council (Calif.), 291 P. (2d) 1, 37 LRRM 2233, *cert. granted* 351 U. S. 923 ---- 45, 51

Garner v. Teamsters, 346 U. S. 485, 98 L. Ed. 228, 74 S. Ct. 161 ---- 17, 18, 31, 33, 35, 41, 43, 45, 48, 51

Graybar Electric Co. v. Automotive Union (Mo.), 287 S. W. (2d) 794, 37 LRRM 2556 53

Grimes & Hauer, Inc. v. Pollock, 163 Ohio State 372 6

Guss v. Utah Board (Utah Sup. Ct.), 296 P. (2d) 733, 38 LRRM 2137 ..... 18, 45, 49, 54

Haleston Drug Stores v. NLRB, 187 F. (2d) 418 (C. C. A. 9), cert. den. 342 U. S. 815 ..... 20, 57, 62, 64

Hammer v. Textile Workers (N. J. Superior Ct.), 111 A. (2d) 308, 34 LRRM 2812 51

Hilton Hotels, 37 LRRM 1474 ..... 54, 55

Hogue & Knott Supermarkets, 110 N. L. R. B. 543, 35 LRRM 1060 ..... 38, 39

Hollow Tree Lumber Company, 91 NLRB 635, 26 LRRM 1543 36

Hotel Association of St. Louis, 92 NLRB 1388, 27 LRRM 1243 61

Ideal Soap and Chemical Co., 38 LRRM 1043 54

International Union v. Underwood Corp., 219 F. (2d) 99 (C. C. A. 2) 45

International Union v. Wisconsin Board, 336 U. S. 245, 93 L. Ed. 651, 69 S. Ct. 516 ..... 31, 32, 34, 40, 41, 43, 55

Interstate Overall Service Inc., 37 LRRM 1431 54

Jackson v. Irving Trust Co., 311 U. S. 50 25

Lee Mark Metal Manufacturing Co. v. Local 596 (Pa. Ct. Common Pleas, Phila. County), 38 LRRM 2219 51

Machinists Union v. Goff-McNair Motor Co. (Ark.), 264 S. W. (2d) 48, 33 LRRM 2641 46

Milwaukee Store Company v. Hosiery Workers (Wisc.), 69 N. W. (2d) 762, 35 LRRM 2757 46

Minor v. Building Trades Council (N. Dak.), 75 N. W. (2d) 139, 37 LRRM 2644 45

National Labor Relations Board versus The Babcock & Wilcox Co.; National Labor Relations Board versus Seam Prufe, Inc., and *Ranco, Inc., versus National Labor Relations Board*, 76 Sup. Ct. 679 22

New York Board v. Wags Transportation System, 130 N. Y. S. (2d) 731, 33 LRRM 2855, 284 App. Div. 883, 134 N. Y. S. (2d) 603 ---------- 53

NLRB v. Denver Building and Construction Trades Council, 341 U. S. 675 ---------- 17, 36, 37, 56

N. L. R. B. v. Indiana and M. Electric Co., 318 U. S. 9 ---------- 56, 60, 74

N. L. R. B. v. Swift, 130 F. Supp. 214 (E. D. Mo.), *aff'd. on other grounds* 233 F. (2d) 226 (C. C. A. 8) ---------- 45, 52

Operating Engineers, 38 LRRM 1431 ---------- 54

Optical Workers Union v. N. L. R. B., 227 F. (2d) 687 (C. C. A. 5), *reh'g. den.* 229 F. (2d) 170, *cert. den.* 351 U. S. 963 ---------- 57, 63

Progressive Mine Workers v. N. L. R. B., 189 F. (2d) 1 (C. C. A. 7), *cert. den.* 342 U. S. 868 ---------- 57

Raisch Motors, 35 LRRM 1631 ---------- 53, 54

Retail Clerks Local No. 1564 v. Your Food Stores, 225 F. (2d) 659 (C. C. A. 10) ---------- 52

Ringling Bros. v. Lewis (N. Y. Sup. Ct.), 37 LRRM 2810 ---------- 51

School District v. Trades Council (Cir. Ct., Ottawa County, Mich.), 37 LRRM 2232 ---------- 52, 53

Spielberg Mfg. Co., 112 NLRB 1080, 36 LRRM 1152 58

Spohn v. Industrial Commission, 138 O. S. 42 ---------- 28

State v. Cleveland & P. R. Company, 94 O. S. 61 ---------- 28

State ex rel. Simpson v. Pennsylvania Co., 85 O. S. 540 28

Stoll v. Gottlieb, 305 U. S. 165 ---------- 25

Teamsters Local No. 25 v. N. Y., New Haven & H. R. Co., 350 U. S. 155 ---- 47

Teamsters Local v. Merchandise Co. (Ind. App.), 132 N. E. (2d) 715, 37 LRRM 2819 ---- 51

Texas R. Co. v. Gulf Refining Co., 270 U. S. 266; 46 Sup. Ct. 263 ---- 16, 24-25

U. A. W. v. W. E. R. B., ---- U. S. ----, 100 L. Ed. 666 31

U. A. W. v. Wisconsin Employment Relations Board, 351 U. S. 266 ---- 40, 41, 44, 59, 69

U. E. v. Worthington Corp., 38 LRRM 2507 (C. C. A. 1) ---- 44, 45, 58

United Constr. Wkrs. v. Laburnum, 347 U. S. 656, 98 L. Ed. 1025, 74 S. Ct. 833 ---- 17, 31, 34, 36, 37, 39, 40, 42, 43-44, 58, 63, 66, 69

United Mine Workers v. Arkansas Oak Flooring Co., 351 U. S. 62 ---- 20, 72, 73, 74

Universal Car Company v. Machinists, 35 LRRM 2087 53

Walker Motors, 36 LRRM 1290 ---- 54

Weber v. Anheuser-Busch, 348 U. S. 468, 99 L. Ed. 546, 75 S. Ct. 480 ---- 17, 31, 40, 41, 44, 45, 47, 51

Wong Yang Sung v. McGrath, 339 U. S. 33 ---- 20, 70, 72

Constitution.

Constitution of the United States:

Article I, Section 8, Clause 3 ---- 27

Tenth Amendment ---- 23

Statutes.

Labor Management Act:

Sec. 301 ---- 74

Sec. 303 ---- 74

National Labor Relations Act, 61 Stat. 136, 29 U. S. C. Supp. V, 151 *et seq.* 35
Sec. 1 66
Sec. 7 ..... 20, 73
Sec. 8(a)(3) 48
Sec. 8(b)(2) 18, 48, 49
Sec. 8(b)(4)(A) and (B) 49
Sec. 9(f), (g) and (h) 21, 73
Sec. 10(a) 19, 20, 52, 59, 60, 61, 63, 64, 65, 66, 68, 69, 71, 72, 76
Sec. 10(b) 60, 74
Sec. 10(j)(l) 59
Sec. 14(a) 74, 75
Sec. 208 59
Sec. 303 59

Public Law 189, 82nd Cong., 1st Sess., Ch. 534, approved October 22, 1951, 65 Stat. 601 72

U. S. C. A. Title 29, Sec. 141 27

U. S. C. A. Title 29, Sec. 142 27

Wagner Act 26, 27

Reports and Publications.

1 CCH Labor Law Reporter ¶ 1610, pp. 1613-1617 39

93 Cong. Rec. 6540 20

95 Cong. Rec. 8717 71

100 Cong. Rec. 6203 71

Hearings before Joint Committee on Labor Management Relations, 80th Cong., 2nd Sess., pp. 1121, 1155-1156, 1157-1165 63-64

Hearings before Senate Committee on Labor and Public Welfare on S. 249, 81st Cong., 1st Sess., pp. 175, 176, 177 64

Hearings on S. 225 et al., 83rd Cong., 1st Sess. 71

Hearings on S. 249, 81st Cong., 1st Sess. 70

Hearings pursuant to H. Res. 115, 83rd Cong., 1st Sess. 71

H. Rept. 317, 81st Cong., 1st Sess., 95 Cong. Rec. 3146 71

H. Rept. 510, 80th Cong., 1st Sess., p. 52 ..... 59, 66

H. Rept. 1852, 81st Cong., 2nd Sess., p. 10 64

H. R. 2032, 81st Cong., 1st Sess. 71

Isaacson, Federal versus State Jurisdiction, 42 A. B. A. J. 415, 484 55-56

Legislative History of the Labor-Management Relations Act, 1947:

Pages 412, 500 65

Page 432 66

Page 556 ..... 59, 66

Page 883 69

N. L. R. B. 16th Annual Report (1952), pp. 15-39, 256-257 64

Report of Joint Committee on Labor Management Relations, S. Rept. 968, 80th Cong., 2nd Sess., Part 3, pp. 11-13 64

S. 2650, 83rd Cong., 2nd Sess. 71

S. Rept. 99, 81st Cong., 1st Sess., Parts 1 and 2 70-71

S. Rept. 99, 81st Cong., 1st Sess., Part 2 71

S. Rept. 99, 81st Cong., 1st Sess., Part 2, p. 75 71

S. Rept. 99, 81st Cong., 1st Sess., Part 1, p. 40 64

S. Rept. 105, 80th Cong., 1st Sess., Part 1, p. 6 and Part 2, p. 38 65

S. Rept. 105, 80th Cong., 1st Sess., Part 1, p. 26 66

S. Rept. No. 986, 80th Cong., 2nd Sess., Part 1, pp. 30-31 70

S. Rept. No. 986, 80th Cong., 2nd Sess., Part 3, pp. 14-15 70

S. Rept. 1211, 83rd Cong., 2nd Sess., pp. 28, 33 71

In the Supreme Court of the United States

OCTOBER TERM, 1956.

No. 41.

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, LOCAL NO. 427, A. F. L., *et al.*,

Petitioners,

vs.

FAIRLAWN MEATS, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

BRIEF OF RESPONDENT.

QUESTIONS PRESENTED.

1. This case presents the question whether or not a State Court may determine the question of fact as to whether the plaintiff, seeking injunction against the violation of the State's public policy, is engaged in business or conduct, which affects interstate commerce; and

2. May a State Court proceed to try an issue as to the violation of the State's public policy in a case in which the business of the plaintiff falls below the jurisdictional standards of the National Labor Relations Board? and

3. May a State Court enjoin continuous trespass by a Union, which does not represent a majority of the employees, and its officers, who are not employees of the plaintiff, where the State Court finds as a fact that the employer does not affect interstate commerce and where the employer's business falls below the jurisdictional standards of the National Labor Relations Board?

STATEMENT OF THE FACTS.

Under this heading, we shall deal with

A. The Pleadings and the Trials.

B. The Parties.

C. The Plaintiff's Relationship with Its Employees.

D. The Conduct of the Defendants.

A. THE PLEADINGS AND THE TRIALS.

Fairlawn Meats, Inc., filed a petition in the Common Pleas Court of Summit County, Ohio on the eighth (8th) day of February, 1954, seeking an injunction and restraining order against all unlawful acts and interference with the operation of the plaintiff's business (R. 1-4).

On the 11th day of February, 1954, the Common Pleas Court entered a temporary restraining order (R. 5).

On the 26th day of February, 1954, the defendants, Amalgamated Meat Cutters and Butcher Workmen of North America Local No. 427, A. F. L., Sam Pollock, its President and James Dougherty, its Business Agent, removed the proceeding to the United States District Court for the Northern District of Ohio, Eastern Division. On the plaintiff's motion to remand the case to the State, after full and complete argument by Union counsel on the question of jurisdiction, Judge McNamee remanded the case to the State Court on the grounds that the petition did not state a federal question and there were no allegations in the petition from which a federal question might be inferred.

On March 26, 1954, the defendants filed its amended answer, asking that the petition be dismissed and the temporary restraining order vacated on the ground that the defendant's acts and conduct were peaceful; that the Na-

tional Labor Relations Board had exclusive jurisdiction of the controversy and that their conduct was not in violation of the laws of the State of Ohio or of the United States (R. 6, 7 and 8).

During the period required to file the motion to remand, the hearing thereon, and consideration of the argumen's of counsel by the Federal Court, the Defendants, Union, President and Business Agent wholly ignored the restraining order and began anew the conduct enjoined by the State Court and continued it unceasingly until March 26, 1954.

To the answer of defendants, plaintiff filed its reply on April 14, 1954 stating the picketing of defendants was for an unlawful objective and was accompanied by intimidation, threats and coercion of plaintiff's suppliers and denied that the National Labor Relations Board had exclusive jurisdiction (R. 9-10).

It was on this state of the pleadings, the cause was tried, beginning May 5, 1954 (R. 11).

At the close of plaintiff's testimony, the defendants moved for a dismissal of the petition "on the ground that the plaintiff has failed to sustain the burden of proof and to sta'e a case entitling it to the relief sought." (R. 109.) There is no question of jurisdiction raised here.

At the close of defendants' testimony, defendants made the following motion: "I now renew the motion on the grounds previously stated, and request as well that the temporary restraining order heretofore issued be vacated." (R. 148.) Again, there is no question of jurisdiction raised. Defendants were relying on the weight of the evidence failing to sustain a finding, not that the Court was without jurisdiction to make a finding and an order.

On September 2, 1954, the Common Pleas Court made a finding embodying First, that the Common Pleas Court had jurisdiction, and Second that the acts and conduct of defendants created a situation that justified the making of a permanent injunction order (R. 148-149).

On October 18, 1954, the Court entered an order, upon its finding of facts, enjoining the defendants from trespassing on its property; and from using threats, force and violence to prevent suppliers furnishing or selling merchandise to plaintiff (R. 156-157).

Defendants not being pleased with this order, on October 27, 1954 filed their Notice of Appeal, bringing this cause to the attention of the Court of Appeals for the Ninth Judicial District of Ohio on questions of law and fact (R. 158). In this Court the case was tried de novo. It was not an error proceeding dealing with the law as stated in the lower court. The parties were afforded the opportunity to present new and additional evidence, cross examine witnesses, try their case anew and argue orally and by way of brief. The Court of Appeals on May 18, 1955, after hearing all the evidence and receiving and considering the briefs of counsel made its finding of facts (R. 158-166). Succinctly, the Court of Appeals said:

> "It is not necessary to discuss jurisdictional yard sticks * * * It is not necessary to explore what areas in labor controversies are left open to the jurisdiction of the state courts. It is apparent that we have before us in the instant case, a question of fact which may be stated. * * * Do the facts herein show that Fairlawn Meats, Inc. is an 'industry affecting commerce' within the terms of the National Labor Management Act (R. 160). * * *
>
> "The evidence herein clearly shows that the business of the plaintiff is purely of a local character. It

is limited in the main to Akron and the surrounding area. The volume of business is not large for a city and county as populous as Akron and Summit County; it does not sell any of its products outside of the State of Ohio. Its purchases from out of this State, both direct and indirect, do not constitute a large portion of the products it offers for sale to the meat-consuming public in Akron and Summit County.

"We find, therefore, there is no burden placed upon or obstruction of interstate commerce by any action taken by the parties to this case." (p. 161.)

Here a tribunal having admitted jurisdiction of the *parties* to the suit, determined the *fact* that the business of the plaintiff and the conduct of the parties placed no burden or obstruction upon interstate commerce. This was an *issue* of fact raised by the parties submitted to the Court on evidence adduced by both sides, resulting in an adverse decision to the defendants. Their complaint was not lack of jurisdiction as contained in the motions but as they say "the plaintiff failed to sustain the burden of proof" (p. 109).

On May 31, 1955, the defendants moved for a new trial in the Court of Appeals (R. 166).

On June 4, 1955, the Court of Appeals entered its decree in the words of the decree of the lower court (R. 167-168).

On June 17, 1955, defendants filed their Notice of Appeal to the Ohio Supreme Court (R. 169) and their Motion to Certify on June 27, 1955 (R. 170). On the Appeal and the Motion to Certify, the Supreme Court of Ohio dismissed the Appeal after hearing upon the transcript of the Record of the Court of Appeals of Summit County "for the reason no debatable constitutional question is involved in said cause" (R. 172).

On November 22, 1955 defendants filed an Application for Rehearing on the ground the Court of Appeals' decision was in conflict with *Grimes & Hau · , Inc. vs. Pollock*, 163 Ohio State 372, a proceeding in which plaintiff alleged that it was engaged in interstate commerce. And, further that the Court of Appeals decision denied employees the right to strike to redress their own grievances (R. 173). Since the decision of the Court of Appeals neither was in conflict with *Grimes & Hauer, Inc.* nor denied employees the right to strike, the Supreme Court of Ohio did not grant a rehearing.

It is to be noted that the National Labor Relations Board has at no time been consulted by the Defendants either to petition for an election for certification as agent for plaintiff's employee or to file a charge of unfair labor practice. From February 11, 1954 to November 22, 1955, the defendants utilized the courts and judicial processes of the State of Ohio in Akron and Columbus, Ohio, and the United States District Court in Cleveland, Ohio.

Certiorari was permitted by this Court on May 7, 1956, together with an invitation to the Solicitor General of the United States to file a brief in behalf of the National Labor Relations Board.

B. THE PARTIES.

Plaintiff-Respondent.

Fairlawn Meats, Inc., the plaintiff in this action in the State Court is an Ohio Corporation whose sole stockholders are Nina and Harvey Ekers. (R. 36). The company began business by opening a meat market on West Market Street, Akron, in 1951; in March of 1952 it opened a meat market in Tallmadge, Ohio, and at West Richfield, Ohio,

in October of 1953. At West Richfield, the land and store are owned by the company and the company is engaged ninety percent (90%) in retail sales of meat and ten percent in locker storage facilities (R. 46). At West Market, the company has no interest in the real estate, but leases space in a market selling groceries, where the company's business is the retail selling of meat, frozen fish and allied items (R. 47). At West Richfield, seven (7) are employed, and at West Market four (4) are employed. The store operated by the company at Tallmadge is leased and normally employs thirty (30) to thirty-five (35) people and its business is ninety-five percent (95%) retail, and the balance is wholesale, i.e. to restaurants in the Akron area (R. 48). The principal purchases are made from suppliers in Ohio (R. 49). In the case of purchases from outside the state, which amount to ten (10) or fifteen (15) percent of the purchases, they are made (R. 49) from local salesmen who call upon the plaintiff, collect for the sales and deposit the proceeds in local banks. Two of the main sources of supply are packers, Gibbs and Peerless of Cleveland, Ohio. Purchases are limited to dressed beef (R. 60). For the year 1953, total purchases, including meats, cheese, poultry and fish, of $873,976.23 were made (R. 65). Of this figure purchases from outside the State of Ohio were made through local representatives of $103,-706.35.

The defendants attempted to show that the dressed meat sold to the plaintiff by Peerless came from cattle purchased outside of the State of Ohio. On this point the defendant's witness, a representative of Peerless (R. 138-139), testified plaintiff purchased $221,526.20 worth of meat in 1953 (R. 143). That the livestock slaughtered in Cleveland, Ohio were purchased on the basis of 56.78%

coming from outside Ohio and 42.22% from within Ohio (R. 145), and that Peerless discontinued selling plaintiff because "there was labor trouble" (p. 146). In the case of Packer Gibbs from Cleveland, defendants called the certified public accountant of Gibbs, who testified plaintiff made purchases of $146,073.90 in 1953 but the company had no knowledge of where the cattle came from, which were slaughtered in Cleveland, Ohio, and delivered to Fairlawn (R. 96).

The Defendants-Petitioners.

The defendant Union, Amalgamated Meat Cutters and Butcher Workmen of North America, Local No. 427 A.F.L. is a labor organization admitting into membership employees in markets operating meat departments in Cuyahoga, Summit, Stark, Portage and Medina Counties (R. 15), i. e., everybody who is employed in a meat market, except supervision (R. 16). In the counties named all contracts of the defendant union contain the union shop clause. On February 2, 1954 the members of Local 427 met in Akron, Ohio, between 50 and 100 in number. They took a strike vote, i.e., employees of other companies did the voting, as the Union officers saw only some of Fairlawn's employees at the meeting, less than ten (10) in number (R. 21) but could not tell how many. Local No. 427 is not employed by the plaintiff. The Union nor its representatives did not know as late as February 11, 1954 how many employees worked at Fairlawn; did not know how many employed at Fairlawn were members (R. 38). It did not know the scale of pay at Fairlawn (R. 38). Its general contract throughout the area (R. 39) contains the Union shop clause requiring membership in the Union as a condition of employment--thirty (30) days

after employment or the signing of the Contract (R. 39). At the meeting on February 2, 1953, a strike at Ekers was authorized by the membership (R. 41). The Union's business agent did not know at the time the strike was authorized whether or not it had a single signed up member at Fairlawn (R. 43.).

Defendant Sam Pollock is not and never was an employee at Fairlawn. He has been the full-time President of Meat Cutters Local Union 427 Affiliated with the Amalgamated Meat Cutters and Butcher Workmen, A.F.L. since May 12, 1953. Prior to that he was an international Union representative (R. 15).

Defendant James Dougherty is not and never was an employee of Fairlawn. He has been the full-time business agent of defendant Local 427 since June 1953. (R. 37).

C. PLAINTIFF'S RELATION WITH ITS EMPLOYEES.

Plaintiff employs seven (7) regular employees at Richfield; four (4) regular employees at West Market; thirty to thirty-five (30-35) regular employees at Tallmadge (R. 48). Extra help or part-time employees, a trucker, bookkeeper and managers increase this number of employees by eight.

The Union's business agent Dougherty called at the stores. Only on one occasion did a single employee mention any dissatisfaction (R. 39): He does not remember who the person was (R. 39); what the name was; and did not prepare a grievance to take it up with the employer. (R. 39). At no time was any opposition whatsoever offered the business agent to discuss the joining the Union, on company time and company property (R. 42). Free access to the employees for that purpose was given the Union representatives (R. 42).

During the three years of operation, Mr. Ekers says (R. 50):

> "Well, I have had differences of opinion in one or two cases over these three years, and as a result in possibly one case the party left my employ and went to somebody else's employ. And we are on the best—in both these cases that I can think of—we are on the best of relations—they felt they could do better elsewhere, and they went."

The company never was requested by the Union or any employee to discuss a grievance over wages, hours or condition of employment (R. 51). By February 4, 1954 no grievance of any kind had been brought to the company's attention (R. 51). When the Union left the standard form of contract through its business agent in August or September 1953 at the Tallmadge store (R. 37) he didn't see Mr. Ekers. Ekers upon reading the provision did ask the employees whether they wanted him to sign a Union contract which would force them to belong to the Union (R. 51) and not a single employee expressed a wish that such a contract be signed (R. 52). From the witness called by the defendants in an attempt to show an interference on the employer's part, by holding a party of Tallmadge employees after working hours at an inn a short distance from the Tallmadge store, we learn (R. 131) that the witness Rodocker attended all the parties and meetings which were held (R. 131); that at this meeting the opinions of the employees were requested (R. 132); that the meeting lasted about 1½ hours; that he and all the rest spoke openly that they didn't want the Union Shop (R. 135); that he had no grievance and for one year's wages he earned $6,315.00 or $1.90 an hour as a journeyman meat cutter (R. 134); for the same period at Kroger's where the Union has a contract he received $1.65 to $1.75 per hour

(R. 135); in addition thereto he was paid $100.00 for a week's vacation for one year's service.

A high school student was paid $1.00 per hour while a student and within six (6) months after he left school he was raised to $1.35 per hour. At his previous place of employment, Saalfield Publishing Company, he was paid eighty-five cents per hour (R. 143). The record conclusively establishes there was no dispute of any kind on any subject between the plaintiff's employees and plaintiff and the relationship between the employer and employees was most satisfactory to all concerned. At this point the defendants, utter strangers, made their unsuccessful efforts to organize. Failing in this through peaceful and voluntary methods they resorted to the next step of obtaining the employer's assistance to compel organization by the execution of a Union Shop agreement. Failing in this, they voted themselves into strike authority by the action of employees of competitors of the plaintiff. Failing to coerce the plaintiff by an expression of this authority, the defendants, not plaintiff's employees, then used the drastic method of picketing and coercing plaintiff's suppliers, by illegally trespassing on the Company's property and preventing by fear and threat plaintiff's suppliers of meat furnishing or delivering the meats needed for the business.

We shall now go to the subject in which we will set forth the acts and conduct of the Defendants as they relate to this plaintiff and its business on which the State Court issued its restraining orders.

D. THE CONDUCT OF THE DEFENDANTS-PETITIONERS.

Sam Pollock, President of Local 427 (R. 122), paid employee of the Union (R. 122) who was never in the meat business, first met Mr. Ekers, President of Fairlawn in May 1952 (R. 16). He asked him to recognize the Union for collective bargaining purposes (R. 16) and presented a uniform contract requiring compulsory Union membership after 30 days employment (R. 123). At that time Mr. Pollock says: "We had some membership, but I don't recollect how many" and "I don't want to hazard a guess." He discussed the Union shop, which is a standard clause in all contracts with meat markets (R. 17). Mr. Pollock at no time was ever in the stores to talk to any of the employees (R. 19). Mr. Pollock states Mr. Ekers told him that "he didn't like to see the Union come in," and that he expressed himself that way to the employees (R. 20). The members of Local No. 427 on February 2, 1954 took a strike vote. Mr. Pollock doesn't know how may Ekers employees were present, nor the number of people from the various other stores in Summit, Cuyahoga, Medina, Stark and Portage counties (R. 21). On February 3, 1954, armed with strike authority, Pollock addressed Ekers: "Well, under those circumstances, you fully understand that we may exercise our right to strike."

On February 3, 1954, Ekers told Pollock and Dougherty some of his employees didn't want to join the Union and "I don't care to negotiate now. I don't want to close the door" (R. 23). However, he had closed the door, because on February 4 at five o'clock in the morning all three stores were picketed by Pollock, Dougherty and members and officers of the Union, none of whom were employees of the plaintiff (R. 24). These pickets parked their cars off the road, opposite and across the street from the Tallmadge store (R. 25). They carried signs: "Please don't

patronize Ekers Meats. We are on strike" or words to that effect (R. 26). This picketing continued during the entire business hours conducted by non-employees and strangers of the plaintiff (R. 27). At Tallmadge picketing was in the driveways to the store (R. 26) and continued during the period the cause was before the Federal Court (R. 27, R. 28). Deliveries were not being made, and Mr. Ekers had to try to get deliveries himself for the business (R. 29). Picketing at Richfield, where the land and building are owned by the company, was conducted right in front of the market with pickets' cars parked on the company property and (R. 30, R. 33) not parked as customers (R. 34). In the latter part of August or early September of 1953, Business Agent Dougherty left the Union's standard contract at the Tallmadge store (R. 37) at which time Mr. Ekers was not there (R. 37). Three or four weeks later, Dougherty met Ekers for the first time (R. 37) but there was no conversation about the contract, except to remind Ekers it had been left (R. 38). Dougherty thought he had four members at that time, but didn't know how many were employed (R. 38). He didn't know what the scale of pay was (R. 38). In conversation with Pollock and Dougherty, Ekers stated "he was worried because if he did sign that contract he may lose some of his personnel" (R. 40), to which Pollock replied: "We have yet to see an employer lose a man" (R. 40). Ekers "talked about these people who didn't want to join the Union and he felt that he might lose them." (R. 40 and 51). Dougherty joined the picketing at 5 a.m. February 4 (R. 43), to stop deliveries and the employees from going to work (R. 44) although the store didn't open until 8 or 8:30 A. M. They used the driveways when pickets were few (R. 44); otherwise between the driveways, but they did not know on whose property they were picketing (R. 45). By virtue of the

picketing more than ninety percent (90%) of the deliveries were stopped (R. 52). Ekers with the help of employees picked up the meat and other supplies and hauled it to the stores (R. 52). After the picketing was resumed in March, pending the U. S. District Court ruling on plaintiff's motion to remand, business agents of the Union, Samino and DeSantis were making efforts to keep Ekers from getting supplies at Swift & Co., in Cleveland (R. 52). Their efforts were unsuccessful at Swift. As Ekers left Swift and Company to go to Peerless Packing Company the business agents followed him there. While attempting to obtain supplies from Peerless, which sales were refused, he returned to his car to find a flat tire (R. 53). The Union had prevailed upon Peerless not to sell to Ekers (R. 54). He was tailed many times by these agents of Local 427 while seeking supplies for the business (R. 54). Earl C. Gibbs, another Cleveland packer, refused to sell merchandise to Ekers (R. 54). As stated by the company's vice president, Earl M. Gibbs, March 5, 1954—Exhibit 10 (R. 184):

> "B. H. Ekers has been a customer of ours for over 30 years, and is a valued account.
>
> "We recently were advised by our Union president that it would be against our best interest, as far as good relationship with our Union is concerned, to continue to sell to Mr. Ekers.
>
> "In order to preserve our good relationship with the Union and its members, our workers, we have abided by their request."

On the morning of February 4, Ekers requested the pickets to stay off the company's property (R. 56). At that time there were twenty (20) or twenty-five (25), including Dougherty (R. 57). At West Richfield, he asked

the business agent of the Union, Mr. Koeber, to leave because he was trespassing (R. 57).

After the picketing was in progress from February 4 to February 10, forty-one (41) employees on February 10 while working in the stores signed the following paper:

> "We, the undersigned, employees of Fairlawn Meats, Inc., hereby certify that there is no dispute or disagreement between us and our employer, Fairlawn Meats, Inc., as to hours of work, rate of pay or any other conditions effecting our employment and we are not on a strike versus our employer, and we are not in favor of our employer signing any agreement that will force or compel us to join any union." (Exhibit 12.)

The Union attempted to show coercion practiced upon three employees. These witnesses called by the Union said:

(a) *Tandarich*: "I didn't have to sign if I didn't want to." (R. 141.)

"Question: Nobody threatened you, did they?
Answer: No, they never." (R. 142.)

(b) *O'Dell*: "They brought the petition around, and everyone was standing around, and they told me if I wanted to sign it, it was all right, and if I didn't it was all right. So, I signed it the same as everyone else." (R. 140.)

(c) *Mayo*: "Mr. Thursby handed this (the petition) to me and said: 'Sign this.' I said: 'Do I have to?' He stuttered and says: 'Well if you want to.' I signed it. I felt I had to. (R. 138.) The Court struck out: 'I felt I had to.'" (R. 138.)

SUMMARY OF ARGUMENT.

A. The State Court has the right and duty to determine whether the essential conditions exist to exercise its jurisdiction. *Texas R. Co. vs. Gulf Refining Co.*, 270 U. S. 266. Having found that the plaintiff's business did not affect interstate commerce, it was the duty of the State Court to pass upon the grievance and apply the laws of the State to the facts of the case and render its judgment subject to and limited only by review in the United States Supreme Court. *Amalgamated Clothing Workers vs. Richman*, 348 U. S. 511.

B. Even assuming that the controversy affects commerce within the meaning of the National Labor Relations Act, the state courts below properly held that they had jurisdiction because the National Labor Relations Board (N. L. R. B. or Board) would decline jurisdiction in the matter. This Court has recently reserved decision on whether a state court may apply state law or policy in such circumstances. *Building Trades Council v. Kinard Construction Co.*, 346 U. S. 933.

Petitioners concede, the N. L. R. B.'s brief states, and the findings of the trial court are that the case here does not fall within the Board's announced jurisdictional standards and accordingly the Board would decline jurisdiction. The facts of record likewise establish this to be the case. It would have been futile therefore for Respondent to have sought any relief through the N. L. R. B. *Building Trades Council v. Kinard Construction Co.*, 346 U. S. 933. This Court has approved the Board's practice of declining to take jurisdiction in cases where the impact upon commerce is slight, in order that it may devote its limited budget and personnel to the prompt handling of major cases and thus better effectuate the purposes of the Na-

tional Labor Relations Act. *NLRB v. Denver Building and Construction Trades Council*, 341 U. S. 675, 684; *Breeding Transfer Company*, 110 NLRB 493, 35 LRRM 1020, 1021.

Labor relations over which the several states have traditionally exercised control remain within state power until pre-empted by the Congress. *Allen Bradley Local v. Wisconsin Employment Relations Board*, 315 U. S. 740, 748-750; *Weber v. Anheuser Busch*, 348 U. S. 468, 480. And the intention of Congress to exclude the states must be clearly manifested (*Allen Bradley Local, supra*, at p. 749) because Congress has the power to speak clearly to that end. The National Labor Relations Act does not expressly state the extent to which the states are excluded and since here the case is one where the delegated power, if any, "lies dormant and unexercised" (*Bethlehem Steel Co. v. N. Y. State Labor Relations Board*, 330 U. S. 767, 775), there is no logical basis for implying the exclusion of state power.

The basis for denying to the states their power to act in matters of labor relations is the possibility of conflict with paramount federal authority. *Garner v. Teamsters Union*, 346 U. S. 485, 490-491, 498-499; *United Construction Workers v. Laburnum Construction Corp.*, 347 U. S. 656, 663 (note 5) and 665. But there is no possibility of conflict with federal authority where, as in the circumstances here, the N. L. R. B. has announced that it will not take jurisdiction of the matter. Furthermore, the state courts and state labor boards are almost unanimously agreed that they may act where the N. L. R. B. declines jurisdiction. Otherwise a large segment of industrial relations, predominantly local in character and where labor organization is least developed and hence in greatest need

of state regulation, will be unregulated, leaving the parties to self-help with its bad effects upon the economy. See *e.g. Guss v. Utah Board* (Utah Sup. Ct.), 296 P. (2d) 733, 38 LRRM 2137.

It is also noteworthy that the state court action here was consistent with federal policy as laid down in the National Act. As found by the state courts below, the petitioning union was at all pertinent times a minority union representing but a fraction of Respondent's employees and the purpose of its picketing was to compel Respondent to sign a union-shop agreement and thus force its employees to join the union. Such picketing is both unprotected and proscribed by the National Act. Sec. 8(b)(2) of the Act; *Garner v. Teamsters Union,* 346 U. S. 485, 487, 488-489, note 5. Such activities were also found by the state Court of Appeals below to be unlawful under Ohio public policy and this Court has approved the legality of such a state policy. *Building Service Employees International Union v. Gazzam,* 339 U. S. 532. The federal and state policies being consistent and not in conflict and the federal Board declining jurisdiction, plainly state court jurisdiction should be upheld.

Practical considerations likewise support the ruling below. A contrary result would compel the N. L. R. B. to take jurisdiction in all cases falling within the scope of the National Act to the exclusion of arbitration tribunals as well as state courts, lest innocent parties be left without legal recourse where they have suffered unlawful damage. But the Board, with its limited budget and personnel, if burdened with many cases where the impact upon commerce is small, would be seriously hampered in carrying out the policies of the National Act in much more important cases where really serious threats to interstate

commerce are presented. Contrary to Petitioners' statement as to the Board's position, the Board's brief herein supports Respondent's contention that a state may act where the Board declines jurisdiction.

Petitioners' contention, based upon the proviso to Sec. 10(a) of the Act, that only by cession agreement with the N. L. R. B. may a state enter the field covered by the National Act, will not bear analysis. First, the proviso to Sec. 10(a) deals only with cases in which the Board asserts jurisdiction and does not purport to deal with cases which the Board leaves entirely free by declining for policy reasons to assert jurisdiction. The language of Section 10(a) shows that Petitioners are in error in asserting that that Section allows cession only in cases of "local" industries. It applies for example to large retailing over which the Board does assert jurisdiction. Accordingly, contrary to their contention the proviso to Section 10(a) is in nowise rendered meaningless by applying it only to cases where the Board asserts jurisdiction. Furthermore, the legislative history underlying the proviso demonstrates that Congress' concern was with the problem of concurrent jurisdiction by the National and state boards over the same controversy and not with the type of situation presented here, where the National board declines to enter the controversy altogether. This is made manifest by the fact that, as Petitioners concede, the proviso to Section 10(a) resulted from Congress' desire to meet situations made possible by *Bethlehem Steel Co. v. N. Y. State Labor Relations Board*, 330 U. S. 767. That case involved a nationwide steel enterprise over which the Board obviously asserts jurisdiction. Indeed the Board had there asserted jurisdiction and specifically declined to designate a foremen's bargaining unit. And what is most

significant, the Court specifically stated in that case that it was not passing upon the problem raised where the Board declines jurisdiction for policy reasons. 330 U. S. at 776. In the light of this Court's statement in that case, which was the progenitor of the Section 10(a) proviso, no basis exists for holding that such proviso was intended to deal with the type case now before the Court.

Second, Congress was well aware, when it enacted the proviso to Section 10(a) in 1947, of the Board's practice for policy reasons to decline jurisdiction in many cases, and since there is no evidence that Congress meant to take this power from the Board, its approval of the Board's practice is to be presumed. *Haleston Drug Stores v. NLRB*, 187 F. (2d) 418, 421, 422 (C. C. A. 9), cert. den. 342 U. S. 815. There is no reason to suppose that by Section 10(a) Congress was disapproving the correlative practice of state courts in assuming jurisdiction in that situation. Third, the debates on the conference report on the Taft-Hartley Act refute Petitioners' argument. 93 Cong. Rec. 6540.

Equally untenable is Petitioners' argument based upon the failure of Congress to repeal the proviso to Section 10(a). Occurrences in Congress since 1947 establish, if anything, congressional acquiescence in the Board's creation of jurisdictional standards and the state courts' assuming jurisdiction in such cases. Petitioners' entire reliance is upon "incompleted steps in the legislative process" and this Court has refused to draw inferences as to legislative intent from such incompleted steps. *Wong Yang Sung v. McGrath*, 339 U. S. 33, 47-48.

Likewise without foundation is Petitioners' reliance upon the recent decision of this Court in *United Mine Workers v. Arkansas Oak Flooring Co.*, 351 U. S. 62. In that case the Court simply held that a state court may not enjoin peaceful union picketing, protected by Section 7 of

the National Act, of an employer who fell within the Board's jurisdictional standards, on the ground that the union was not in compliance with Sections 9(f), (g) and (h) of the Act. In the subject case not only did the employer not meet the Board's jurisdictional standards, but the union's activity was not protected, and indeed was proscribed, by the National Act.

ARGUMENT.

JURISDICTION OF THE STATE COURT.

At the outset of this discussion, we must recognize throughout that we are dealing not with employees of Fairlawn but with the Butchers Union, its President and its Business Agent. They alone are the defendants. There is not a shred of credible testimony in the record which establishes the Union or its officers as representatives of any of the employees for bargaining purposes, and at no time did the defendants furnish either to the employer or to the Court any evidence tending to establish representation of a majority. Nor is there any order directed against employees of Fairlawn, nor any attempted infringement of the right to strike, or any conflict in the labor policy of Ohio as it meets the Congressional labor policy. Nor has there been any effort or act upon the part of the Ohio judiciary to ignore the national policy as enunciated by Congress and interpreted by this Court. The Courts of Ohio have enunciated the policy of the State to be that picketing by strangers to the employer-employee relationship for the purpose of coercing an employer to execute a contract which requires his employees against their will to join the picketing union is for an illegal objective and will be enjoined. This policy is not in conflict with any provision of the Labor Management Act.

We must recognize here as the Court has recognized in *National Labor Relations Board versus The Babcock & Wilcox Co.; National Labor Relations Board versus Seam Prufe, Inc.*, and *Ranco, Inc., versus National Labor Relations Board*, 76 Sup. Ct. 679, that the distinction between employees soliciting and non-employee union solicitors is one of substance. As this Court said on page 685:

(10-13) "The distinction is one of substance. No restriction can be placed on the employees' right to discuss self-organization among themselves, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline. Republic Aviation Corporation versus National Labor Relations Board, 324 U. S. 793, 803, 65 S. Ct. 982, 988, 89 L. Ed. 1372. But no such obligation is owed non-employee organizers. There access to company property is governed by a different consideration. The right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others. Consequently, if the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them, the employer must allow the union to approach his employees on his property. No such conditions are shown in these records.

"The plants are close to small well-settled communities where a large percentage of the employees live. The usual methods of imparting information are available. See, e.g., note 1, *supra*. The various instruments of publicity are at hand. Though the quarters of the employees are scattered they are in reasonable reach. The Act requires only that the employes refrain from interference, discrimination, restraint or coercion in the employees' exercise of their own rights. It does not require that the employer permit the use of its facilities for organization when other means are readily available."

We sincerely urge the application of at least a portion of semantics, the science dealing with meaning as contrasted with phonetics, the science of sounds. We have read many statements on "vacuum," "pre-emption," "vesting" and "divesting." For a moment let's examine what they "mean," not merely how they "sound." It is axiomatic that Congress has no inherent power; it has only delegated powers, which were delegated to it as a constitutional branch of government by the people of the States. In the States there inherently existed the right of the people to preserve and protect themselves and enact rules of conduct, which would preserve and protect their individual lives and property. This was something never delegated by the States to the United States. This is something that existed in the State, in the beginning has never been delegated to anyone and still remains in the State. We can not have a vacuum in a container, where something still remains. There is no vacuum in Ohio. The inherent right of the people to obtain through their State Courts the adjudication of problems dealing with the existence and protection of their life and property was never delegated, and cannot be preempted by a Congress, which has not received the sanction of the States to preempt a field within the States. Let us not be confused by the false premise that all rights lie in the United States, the creature of the "united states," because the United States has no inherent power. No one has yet the audacity of speaking of "divine right," as an attribute of the United States, nor to mention the conflict of 1861-1865 as a war of the United States against the Confederacy. It is correctly referred to as the war between the States. We have not yet heard of any repeal of the Tenth Amendment providing that:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The Courts of Ohio have not attempted to question the power of the National Labor Relations Board to promulgate rules, which shall be used by the Board to determine the impact of the particular business upon interstate commerce. They have not questioned the reasonableness of yardsticks created by the Board. They have not attempted to declare what are and what are not unfair labor practices in the field of interstate commerce. They have not rendered a single decision that is in conflict with the National policy on labor. They have not used the federal laws as a basis for the determination of what is an offense or what conduct is contrary to the public policy of the State of Ohio. This is true even though the long arm of the high sounding word "commerce" has reached out to govern the peanut vendor on the street corner and the butcher shop at the country cross-roads.

Now, who has the primary right to determine whether Ekers' business affects interstate and whether the acts and conduct of interlopers to control the living of his employees constitute violation of the public policy of Ohio. This Court has many times stated that it is the duty of State Courts to enforce the public policy of the State and it is immaterial whether the public policy was announced by the legislature or the Courts of the State. This obligation lies in the State Court in a case presenting facts such as here.

The right, duty and power of the trial court to examine the facts and conditions essential to the exercise of its jurisdiction is clearly set forth by this Court in *Texas*

R. Co. vs. Gulf Refining Co., 270 U. S. 266; 46 Sup. Ct. 263, decided March 1, 1926. At page 274, Justice Brandeis said:

> "The issue presented to the Court by a denial that the proposed trackage is an extension does not differ in its nature from that raised when the denial is directed to the allegation that the defendant is an interstate carrier. If the facts are agreed, the question is one of law. If they are not agreed, the Court must find them. In the case at bar, the District Court, having jurisdiction generally of the parties and the subject matter was called upon to determine whether an allegation in the bill, essential to the cause of action, was established. This, the Court clearly had the power to do. Moreover, even if the question were, as contended, properly one of jurisdiction, the objection urged could not prevail. *Every court of general jurisdiction has power to determine whether the conditions essential to its exercise exists.*" (Emphasis ours.)

In this case Justice McReynolds dissented on the ground the question should have been first submitted to the I. C. C.

In dealing with the question of jurisdiction in a suit under the Trading with the Enemy Act, this Court followed and cited *Texas R. Co. vs. Gulf R. Co.*, 270 U. S. 266 in *Jackson vs. Irving Trust Co.*, 311 U. S. 50, decided January 6, 1941.

In *Stoll vs. Gottlieb*, 305 U. S. 165, decided by this Court in 1938, this Court again followed 270 U. S. 266 and at page 171 said:

> "While a court does not have the power by judicial fiat to extend its jurisdiction beyond the scope of the authority granted to it by its creators, it has the power to interpret the language of the jurisdictional instrument and determine its application to an issue before the Court."

We have not had a little Wagner Act in Ohio. Possibly we are considered back-woodsmen, but we know of no power in Congress that can compel the Ohio Legislature to pass such an Act and create a Board similar to the National Board with whom an agreement may be made to handle the case load of the National Labor Relations Board for reasons of economy, cession of jurisdiction, ceding of authority or the many other fine sounding words attributed to this foolish theory. It would be just as reasonable and logical for the Ohio legislature to pass an Act which would create Courts with which the Federal Courts could make agreements to handle the cases pending in our Federal Courts for the sake of economy, etc. to lighten and reduce the case load which burdens the Federal District Courts in Ohio and throughout the nation. The absurdity of the suggestion destroys the logic of its assertion.

In the briefs of the Union and of the A. F. L.-C. I. O., we have read many quotes from Labor Board Reports as contrasted to Board decisions. Also, many predictions as to what decision the Board would make under this or that set of facts. The charge is made that the jurisdictional standards set up by the Board "were in fact politically motivated" (Brief A. F. L.-C. I. O. p. 12). We have no access to the minds of the members of the Board to predict what will be the decision of the Board on any particular set of facts or circumstances but we firmly believe the litigant and lawyer must await trial and decision before the Board to announce with any degree of accuracy what is its answer. Nor had we expected to have to meet a political argument in the defense of the rights of the Courts of Ohio to hear and determine a matter before them. Much might be said on political motivation, which would be neither new, enlightening nor helpful to this Court, as we

are sure the Court well knows, that acts and conduct in government, outside the judiciary of our nation, are largely "politically motivated" and there is little our courts or its officers can do about it.

Historically speaking the Wagner Act was primarily intended to declare a right which existed inherently in the individual working man. The right to organize and join a union of his own choosing to bargain collectively seemed to be questioned by the issuance of injunctions largely at the hand of Federal Judges. The Act took nothing away that existed either in the individual or in the Courts of the State in which he resided. Labor leaders and legislators understood that in declaring this right a federal policy it would require some constitutional attachment to protect it against attack. That attachment turned out to be the "commerce" clause of the Constitution. (U. S. C. A. Title 29 Sec. 141). Congress in its definitions defined "industry affecting commerce" as "any industry or activity in commerce or in which a labor dispute would burden or obstruct commerce or tend to burden or obstruct commerce or the free flow of commerce." (U. S. C. A. Title 29 Sec. 142). The "commerce" Congress is dealing with obviously is "interstate commerce." It is powerless to deal with any other. Article I Section 8 Clause 3 of the Federal Constitution says the Congress shall have power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." This was a grant to Congress of power over interstate commerce but was no limitation upon the right of the state to deal with its internal affairs, including the problems arising in intrastate commerce. When there has been a clash on what constitutes interstate commerce and what constitutes intrastate commerce, the Courts of Ohio have uniformly

been scrupulously careful to protect the litigant whose business, conduct, contract, franchise, or other rights asserted brought him into the category of interstate commerce. For example, in *State vs. Cleveland & P. R. Company,* 94 O. S. 61, the Supreme Court of Ohio recognized the paramount right of the U. S. to control navigable waters and establish harbor lines.

Ordinances restricting the speed of trains within city limits in an unreasonable manner are invalid. *Blanche vs. New York Central Railroad Company,* 103 O. S. 471.

The State has no power to fix ferriage rates. *Bellaire vs. B. & W. Ferry Co.,* 105 O. S. 247.

State Workmen's Compensation Laws do not apply to services rendered by employees of corporations of other States performed in interstate commerce only. *Spohn vs. Industrial Commission,* 138 O. S. 42.

A statute designed to forbid a railway from establishing a relief association, membership in which would require a waiver of right of action against the railway for personal injuries is unconstitutional if applied to railways in interstate commerce, and could be applicable only to those engaged in intrastate commerce. *State ex rel. Simpson vs. Pennsylvania Co.,* 85 O. S. 540.

Whether the question presented concerned a legislative act of the State of Ohio or one of its municipalities or the assertion of a right by an individual, the Courts of Ohio have in the past and may be expected in the future to deal without bias or prejudice and with sound discretion with the facts bearing upon interstate or intrastate commerce. This Court may well expect litigants in the Courts of the several States to be treated likewise.

In the Labor Management Act, instead of using the customary words used in other Federal Acts "engaged in interstate commerce," it was broadened to "affecting inter-

state commerce." Certain interests seek to broaden it further by dropping out the word "interstate" and construe the Labor Management Act as covering everybody "Affecting commerce." An act, originally intended to declare a right that had been questioned in the Federal Courts largely, has developed into an all embracing octupus sending its tentacles out to envelop the little as well as the big in a wholly local situation, where only as a figment of the imagination is interstate commerce affected in truth and fact.

Whether we view affecting interstate commerce by "de minimis" or by "labor board yardstick," "affecting interstate commerce" is a question of fact. Congress has not attempted to describe this term by metes and bounds. We need not enter the field of speculation as to why. Let it be sufficient to assume there were men learned in the law who realized that interstate commerce was a condition precedent to the attaching of jurisdiction by a Federal Court or Board set up to administer the act. It is not a question of the State Court giving up a duty and having it returned by vesting or by agreement with the Labor Board. It is the question of establishing as a fact that Ekers' business and conduct affected not merely commerce, but interstate commerce. Ekers had sought relief in the Courts of his State. The Federal Court found his claim did not present a Federal question. When back in the Court of his State, he is met with the defense that he has filed in the wrong place because his business affects interstate commerce. Is the mere assertion by a litigant that his adversary is engaged in a business affecting interstate commerce sufficient to deprive the Court of its jurisdiction to hear the case, pass upon the evidence, make its findings and enter valid orders? The answer is, obviously, "No." The Court did not rely upon the bold assertion in

the answer that interstate commerce was affected. It heard the evidence adduced by both parties on this question.

In order to reverse the holdings of the Ohio Court, this Court must find no state court in the nation can hear and determine a question of fact, particularly if the question is: "Is one of its citizens engaged in a business that affects interstate commerce." It must say only the Labor Board has the right, the fairness and the intelligence to pass on this question and the Board's judgment is final except on review to the Board's general counsel.

We have not attempted to over-simplify the position of Ohio's Courts or of my client's position, but we sincerely feel the foregoing should be dispositive of this cause. We have carefully examined the decisions of this Court as they pertain to the Rules of the Board, the Board's jurisdiction to make rules and regulations regarding jurisdictional standards and the Preemption of the Field of Labor by the Act. With these questions we shall now deal, for such assistance as it may be to the members of this Court.

THIS COURT HAS NEVER DIRECTLY DECIDED THIS ISSUE, BUT IN SEVERAL CASES HAS INDICATED THAT STATE JURISDICTION COULD PROPERLY BE EXERCISED TO PROVIDE DUE PROCESS OF LAW.

The doctrine of federal preemption in the labor relations field and the interrelationship of the jurisdiction of federal and state tribunals has recently received considerable attention by this Court.[1] In some of these cases it has been held that the exercise of state jurisdiction was precluded, while in others, under different circumstances, the propriety of state action has been upheld. In the *Anheuser-Busch* case, 348 U. S. 468, this Court set out a rather comprehensive review of "where our decisions have brought us" in this field indicating quite clearly that the basic factor distinguishing the two types of cases was the existence or non-existence of actual or potential conflict of judicial decisions between federal and state tribunals applying identical remedies to the same identical conduct. Also as succinctly stated in the *Laburnum* case, "if no conflict had existed, the state procedure would have survived." 347 U. S. 656.

While this Court has thus dealt extensively with this general field, it has never had occasion to rule directly on the issue involved in this case—whether the employer who is too insignificant in volume of interstate commerce to meet the Board's jurisdictional standards, whose labor

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[1] *International Union v. Wisconsin Board*, 336 U. S. 245, 93 L. Ed. 651, 69 S. Ct. 516; *Bethlehem Steel Co. v. N. Y. S. L. R. B.*, 330 U. S. 767, 91 L. Ed. 1234, 67 S. Ct., 1026; *Algoma P. & V. Co. v. W. E. R. B.*, 336 U. S. 301, 93 L. Ed. 691, 69 S. Ct. 584; *Garner v. Teamsters*, 346 U. S. 485, 98 L. Ed. 228, 74 S. Ct. 161; *United Constr. Wkrs. v. Laburnum*, 347 U. S. 656, 98 L. Ed. 1025, 74 S. Ct. 833; *Weber v. Anheuser-Busch*, 348 U. S. 468, 99 L. Ed. 546, 75 S. Ct. 480; *Amalgamated Clothing Workers v. Richman Bros.*, 348 U. S. 511, 99 L. Ed. 600, 75 S. Ct. 452; *U. A. W. v. W. E. R. B.*, ------ U. S. ---------, 100 L. Ed. 666; and other cases.

relations do not "affect commerce" in the Board's Congressionally authorized discretion, who cannot obtain any hearing or remedy from the federal tribunal because it would not effectuate the policies of the Act for the Board to take or exercise jurisdiction over such business—whether an employer so isolated from the federal Act, the federal tribunal, and federal remedies shall also be denied access to the proper state tribunal and remedies and thus be placed in a judicial vacuum, where he has no access to any tribunal or remedy whatsoever.

Although this Court has never specifically decided this precise question, it has not been unaware of its importance, and has frequently indicated what the decision would be. In those cases where states have been prevented from exercising jurisdiction, this Court has been careful to distinguish our present situation from the one there involved; in those cases sustaining the exercise of state jurisdiction, the controlling principles have been clearly announced. The basic principles and underlying considerations established by such cases are applicable and controlling here. As the following brief references show, and as we will more fully establish below, where conduct is "governable by the state, or entirely ungoverned," the choice must be in favor of state control and against anarchy.

Thus, in *International Union v. W. E. R. B.*, 336 U. S. 245, 254, this Court sustained state control of a phase of labor relations of an employer admittedly engaged in interstate commerce. However, as to the particular conduct involved, the Court noted that "There is no existing or possible conflict or overlapping between the authority of the Federal and State Boards * * *. This conduct is governable by the state or it is entirely ungoverned."

Similarly, in *Algoma Plywood & Veneer v. W. E. R. B.*,

336 U. S. 301, 313, again involving an admittedly interstate business, the Court noted that the federal Act only covered unfair labor practices "listed in section 8" and held that the "States are free" to deal with unfair labor practices "not listed in Section 8." The Court said "where the State and federal laws do not overlap, no cession is necessary because the State's jurisdiction is unimpaired."

In *Bethlehem Steel Co. v. N. Y. L. R. B.*, 330 U. S. 767, 776, the Court denied state power to certify foremen's unions as appropriate after the federal Board had already announced its policy to the contrary. But it reserved as distinguishable the question presented here, saying, "The election of the National Board to decline jurisdiction in certain types of cases, for budgetary or other reasons, presents a different problem, which we do not now decide."

In *Garner v. Teamsters*, 346 U. S. 485, 488, the Court limited the application of that decision to cases of direct jurisdictional conflict, saying, "This is *not* an instance of injurious conduct which the National Labor Relations Board is without express power to prevent, and which therefore is 'governable by the State or it is entirely ungoverned'." As in *Bethlehem Steel, supra*, the Court specifically anticipated and reserved the issue now presented —"Nor is there any suggestion * * * that the federal Board would decline to exercise its powers once its jurisdiction was invoked."

Finally, the most specific statement was made in *Building Trades Council v. Kinard*, 346 U. S. 933, 98 L. Ed. 423, where the Court said:

> "Since there has been no clear showing that respondent has applied to the National Labor Relations Board for appropriate relief, or that it would be futile to do so, the Court *does not pass upon the question*

suggested by the opinion below of whether the state court could grant its own relief should the board decline to exercise its jurisdiction."

The principal issue of this case is therefore one which this Court has specifically reserved and pointedly distinguished from those in previous cases where state jurisdiction has been denied. We submit that the Court has done so because constitutional considerations require the exercise of proper state jurisdiction in the circumstances of this case.

Since the propriety of the Board's action in establishing jurisdictional standards has been demonstrated above, there is no appeal, review, or recourse from the Board's refusal to take jurisdiction in such cases. To such a rejected complainant, the federal law, the federal Board, and the federal remedies are equally as valueless and nonexistent as they are to the most "intrastate" complainant that could possibly be imagined. Both are completely insulated and isolated from the federal law, procedures, and remedies, one by statutory definition, and the other by Congressionally and judicially approved interpretation of that definition. One is clearly and admittedly free to resort to the state courts for an adjudication of his grievance, and application of state remedies, if warranted—the only available remedies under the circumstances. How is the other to be treated? Will his grievance be heard anywhere, or will he be denied his constitutional guarantee of due process of law?

Thus, where this Court has held that if conduct is "governable by the State or entirely ungoverned" it must be governable by the state,[2] the union instead maintains

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[2] *International Union v. W. E. R. B., supra; Algoma Plywood & Veneer Co. v. W. E. R. B., supra; United Constr. Workers v. Laburnum, supra; U. A. W. v. N. L. R. B., supra.*

it should be entirely ungoverned. We submit that the union's contention is wrong. While the Board can and has properly interpreted the Act to mean that certain businesses are too small to require application of the federal law to effectuate its purpose, and has therefore declared that its federal jurisdiction will not encompass them, it has not ostracized such people or converted them into legal lepers that no Court can touch.

ASSUMING THAT THE INSTANT CONTROVERSY AFFECTS COMMERCE WITHIN THE MEANING OF THE NATIONAL LABOR RELATIONS ACT, SINCE THE NATIONAL LABOR RELATIONS BOARD WOULD DECLINE TO EXERCISE JURISDICTION HERE, THE STATE COURT CORRECTLY CONCLUDED THAT IT HAD JURISDICTION OF THE CASE.

Assuming, without conceding, that the controversy affects commerce within the meaning of the National Labor Relations Act, 61 Stat. 136, 29 U. S. C. Supp. V, 151 *et* seq., the state court correctly asserted jurisdiction in the case, because the National Labor Relations Board (hereinafter sometimes called the N. L. R. B., the National Board, or simply the Board) would decline jurisdiction in the matter. This Court has at least twice in recent years reserved decision on the question of whether in such circumstances a state court has jurisdiction to apply state law or policy. *Building Trades Council v. Kinard Construction Co.*, 346 U. S. 933; *Garner v. Teamsters Union*, 346 U. S. 485, 488. We submit that the question should be resolved in favor of state court jurisdiction.

A. The Case Here Is One that Does Not Fall Within the Board's Announced Jurisdictional Standards and the Board Would Therefore Decline Jurisdiction.

The Board, with this Court's approval (*N. L. R. B. v. Denver Bldg. & Const. Trades Council*, 341 U. S. 675, 684), has long taken the position that it would better effectuate the purposes of the National Labor Relations Act

> "* * * not to exercise its jurisdiction to the fullest extent possible under the authority delegated to it by Congress, but to limit that exercise to enterprises whose operations have, or at which labor disputes would have, a pronounced impact upon the flow of interstate commerce." *Hollow Tree Lumber Company*, 91 NLRB 635, 636, 26 LRRM 1543.

This policy was explained by the Board in a Memorandum filed with this Court in March, 1954, in *United Construction Workers v. Laburnum Construction Corporation*, 347 U. S. 656:

> "The Board's abstention from exercising the full measure of its statutory jurisdiction has been prompted, in general, by a policy to utilize its limited budget and personnel in the processing of cases which individually or in the aggregate present, in relation to the Board's potential case-load, the most serious threat to interstate commerce." (Board's Memorandum aforesaid, p. 5.)

More recently, the Board, explaining the reasons for its jurisdictional standards, said:

> "It has been the consistent position of the Board that it better effectuates the purposes of the Act, and promotes the prompt handling of major cases, not to exercise its jurisdiction to the fullest extent possible under the authority delegated to it by Congress, but to limit the exercise to enterprises whose operations

have, or at which labor disputes would have a pronounced impact upon the flow of interstate commerce." *Breeding Transfer Company*, 110 NLRB 493, 35 LRRM, 1020, 1021.

It becomes material therefore to determine whether in the instant case the Board would exercise its jurisdiction or would decline to do so in accordance with its announced policy. It is perfectly plain that here the Board would decline to exercise its jurisdiction and that it would have been futile for Respondent to have sought relief through it. *Building Trades Council v. Kinard Construction Co.*, 346 U. S. 933. Not only is this conceded by Petitioners (Pet. Br., p. 11, note 10), but the brief filed in this case by the Government on behalf of the Board states that the Board would not assert jurisdiction (Govt. Br., p. ____) and the findings of the trial court below are to the same effect (R. 149-150).

In addition, the facts of record show plainly that the case here is one falling far short of meeting the Board's jurisdictional standards. Thus when the Petitioners' strike and picketing began in February, 1954, the Board's jurisdictional standards then in effect were those laid down in a series of Board decisions issued in October, 1950.[3] These decisions announced that the Board would take jurisdiction in the future only over cases falling into nine categories, summarized by the Board at pages 5-7 of the Memorandum filed with this Court in the *Laburnum* case, *supra*, p. 36. The only categories possibly applicable to Respond-

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[3] These standards were also published in a Board press release [No. 342] issued on October 6, 1950, the relevant part of which is reproduced in Appendix A, pp. 79-80, *infra*. This Court has taken specific notice of such standards. *N. L. R. B. v. Denver Building and Construction Trades Council*, 341 U. S. 675, 685, note 14; *United Construction Workers v. Laburnum Construction Corporation*, 347 U. S. 656, 659, note 2.

ent's operations were categories labeled 6 and 7 in said Memorandum, embracing enterprises with a direct inflow of goods from out-of-state valued at $500,000 a year or with an indirect inflow of such goods valued at $1,000,000 a year (Appendix A, p. 80, *infra*). But Respondent's enterprise did not meet these figures, its total annual direct inflow of goods from out-of-state amounting to only a little over $100,000 (R. 66, 67-68; see also R. 50) and its total annual indirect inflow of goods from out-of-state amounting to only some $216,000 (R. 93-95, 143-145, 188 (Defendants' Exh. 15-B).[4] Accordingly the Board would not have asserted jurisdiction over Respondent under its October, 1950, tests.

In *Hogue & Knott Supermarkets*, 110 N. L. R. B. 543, 35 LRRM 1060, decided October 26, 1954, the Board announced new jurisdictional standards as to retail stores. Under such standards, in the case of an intra-state chain of retail stores—the situation here (R. 46-49, 150, 158-159, 161)—the Board will assert jurisdiction over the entire chain or any store in the chain *only* if the total business of *all* the stores in the chain shows that (a) $1,000,000 yearly in purchases come directly from outside the state or (b) $2,000,000 yearly in purchases come indirectly from outside the state or (c) $100,000 yearly

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[4] These figures on indirect inflow were obtained by adopting the theory of Petitioners' counsel (R. 93-94) and attributing to Respondent's business the same percentage of indirect inflow of out-of-state goods as its suppliers' direct inflow of such goods. Thus if Respondent's annual purchases from supplier Gibbs were some $146,000 and Gibbs' out-of-state purchases were 61½ per cent of its total purchases (R. 93-95, 188) it was assumed that Respondent's indirect inflow of out-of-state goods through supplier Gibbs was 61½ per cent of $146,000 or some $90,000. The same method of calculation was used with respect to Respondent's indirect out-of-state purchases through supplier Peerless (R. 143-145).

is shipped to other states.[5] We have already shown that Respondent does not meet either of the purchase tests, i.e., tests (a) or (b). And Respondent does not meet test (c) either for it does not sell or ship any of its goods outside of the state of Ohio (R. 86, 161). Patently then, Respondent's operations do not qualify under the Board's present jurisdictional standards any more than they did under the Board's 1950 standards.

B. Since the Board Would Decline Jurisdiction Herein the State Court Had Jurisdiction to Decide the Issues.

It would seem almost a truism that an employer, aggrieved by unlawful conduct of a union or his employees, must be entitled to appeal to some forum—state or federal—to obtain relief. If the door is closed to him through the avenue of the National Labor Relations Board, then he must be able to appeal to the state courts. Otherwise, although he is an innocent party, he is compelled to suffer the unlawful conduct without redress. This Court has already shown that it would countenance that situation only under the most compelling circumstances and only if the Congress had in the clearest language announced that to be its intention. See *United Construction Workers v. Laburnum Construction Corporation*, 347 U. S. 656,

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[5] On July 15, 1954, the Board had issued a press release (R. 449) announcing general revisions in its jurisdictional standards. The standard there announced as to an intrastate chain of retail stores differed from the standard later announced in the *Hogue & Knott* case in that it required the individual store rather than the entire chain to meet the dollar volume tests set forth in the text. R. 449 is reproduced in Appendix B, pp. 81-87, *infra*; see also 1 CCH Labor Law Reporter ¶ 1610, pp. 1613-1617. This change is irrelevant here because as shown in the text, even Respondent's stores together do not meet the dollar volume test. The Board's 1954 standards apply today. They were noted by this Court in *Brooks v. N. L. R. B.*, 348 U. S. 96, 104, note 16.

669, upholding a state court tort action against a union for damages resulting from threats and intimidation which prevented the plaintiff from continuing a construction project, this Court saying that if the state court were denied jurisdiction, that would mean that where federal preventive administrative procedures are impotent or inadequate, the offenders may destroy property with impunity. And *cf. U. A. W. v. Wisconsin Employment Relations Board*, 351 U. S. 266, 274-275, where this Court allowed a state to enjoin violent union conduct that was also an unfair labor practice under the National Labor Relations Act, holding that local communities suffer most from the loss occasioned by coercion and that it would not interpret an act of Congress to leave such communities powerless to avert such emergencies without compelling directions to that effect.

As we shall show, all reason and authority call here for upholding the state court's jurisdiction to act.

1. Under Settled Principles, No Basis Exists for Implying the Exclusion of State Power.

The decisions of this Court are plain that "labor relations over which the several states traditionally have exercised control" (*International Union v. Wisconsin Employment Relations Board*, 336 U. S. 245, 252) remain within state power until pre-empted by the Congress. *Allen Bradley Local v. Wisconsin Employment Relations Board*, 315 U. S. 740, 748-750; *Bethlehem Steel Co. v. N. Y. State Labor Relations Board*, 330 U. S. 767, 772; *United Construction Workers v. Laburnum Construction Corporation*, 347 U. S. 656, 663, note 5; *Weber v. Anheuser Busch*, 348 U. S. 468, 480; *U. A. W. v. Wisconsin Employment Relations Board*, 351 U. S. 266, 271. Moreover, the

"intention of Congress to exclude states from exerting their police power [in this field] must be clearly manifested." (Emphasis supplied.) *Allen-Bradley Local v. Wisconsin Employment Relations Board,* 315 U. S. 740, 749 and cases there cited; *International Union v. Wisconsin Employment Relations Board,* 336 U. S. 245, 253; *U. A. W. v. Wisconsin Employment Relations Board,* 351 U. S. 266, 273, note 11.

This Court has also said that

> "The National Labor Management Relations Act, as we have before pointed out, leaves much to the states, though Congress has refrained from telling us how much. We must spell out from conflicting indications of congressional will the area in which state action is still permissible." *Garner v. Teamsters Union,* 346 U. S. 485, 488, note 4, *Weber v. Anheuser Busch,* 348 U. S. 468, 480.

While then the exclusion of state power may be implied, in deciding whether to make such implication, this Court considers "the respective relation of federal and state power to the general subject matter" at hand. *Bethlehem Steel Co. v. N. Y. State Labor Relations Board,* 330 U. S. 767, 772. And as Mr. Justice Frankfurter pointed out in his separate opinion in that case,

> "Since Congress can, if it chooses, entirely displace the States to the full extent of the far-reaching Commerce Clause, Congress needs no help from generous judicial implications to achieve the supersession of State authority. To construe federal legislation so as not needlessly to forbid pre-existing State authority is to respect our federal system. Any indulgence in construction should be in favor of the States, because Congress can speak with drastic clarity whenever it chooses to assure full federal authority, completely displacing the States." *Id.,* p. 780.

Applying the foregoing principles to the facts at hand, this is not a case for implying the exclusion of state authority. Unlike the situation in *Bethlehem Steel*, 330 U. S. 767, where the Board declined to designate a foremen's bargaining unit and that determination took on the character of a decision that said unit was inappropriate for bargaining purposes (330 U. S. at 774-775), the Board here has declined for reasons explained in the *Breeding Transfer* case, *supra*, pp. 36-37, to consider the case at all because the Respondent's business does not satisfy its jurisdictional standards. The case therefore is one where the delegated federal power "lies dormant and unexercised" (*Bethlehem Steel*, 330 U. S. 767, 775) and accordingly falls into the category of cases where state power has not been precluded. (*Id.*, pp. 773-774).[6]

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[6] It has even been suggested that the exclusion of state power should not be implied notwithstanding Congress has brought the matter within federal control, unless Congress has provided a remedy for the conduct from which it is sought to exclude the state power; and that in the absence of a federal remedy, the state remains free to apply its own remedy. See *Aladdin Industries v. Associated Transport* (Tenn. App.), 38 LRRM 2599, where the Court reached this conclusion based upon an exhaustive review of this Court's recent decisions on the subject. While support for this conclusion is found in such cases as *United Construction Workers v. Laburnum Construction Corporation*, 347 U. S. 656, and *Benz v. Compania Naviera Hidalgo*, 233 F. (2d) 62, 66 (C. C. A. 9), it is not necessary for this Court to reach that question here. The significant point here is that the National Labor Relations Board has declined to exercise its jurisdiction, regardless of whether the federal Act provides a remedy, and that in such circumstances there is no basis for denying the state court's jurisdiction.

2. The Principle Underlying the Exclusion of State Power Is In Conflict with Federal Authority and No Possibility of Such Conflict Exists Where the National Board Declines Jurisdiction Altogether.

Although, significantly, Petitioners' lengthy brief is wholly silent on this matter, the decisions of this Court establish that the basis for denying the states the right to exercise their power in matters such as that involved here is the possibility of conflict with paramount federal authority. Thus in *Bethlehem Steel, supra,* this Court pointed out (pp. 775-776) that both the federal and state governments had laid hold of the same relationship for regulation and it involved the same employers and employees. Each had delegated to an administrative authority a wide discretion in applying this plan of regulation and they were governed by different standards. The situation was too fraught with potential conflict (Bethlehem Steel obviously being an enterprise over which the National Board would assert jurisdiction) to permit intrusion of the state even though the National Board had not acted in the particular case. On the other hand, in *International Union v. Wisconsin Employment Relations Board,* 336 U. S. 245, 254, state prohibition of recurrent, unannounced work stoppages was upheld on the ground that conduct was neither protected nor prohibited by the National Labor Relations Act and hence presented no existing or possible conflict between federal and state authorities.

In *Garner v. Teamsters Union,* 346 U. S. 485, 490-491, 498-499, the Court emphasized that the conflict between the two governments (state and federal) lay in remedies and that the potential conflict was quite serious. And in *United Construction Workers v. Laburnum Con-*

struction Corporation, 347 U. S. 656, the Court said (p. 663, note 5):

> "The cases relied upon to exclude state jurisdiction are those where a conflict with federal control has been made clear."

The Court added (p. 665):

> "To the extent that Congress prescribed preventive procedure against unfair labor practices, that case [Garner] recognized that the Act excluded conflicting state procedure to the same end * * * The care we took in the *Garner* case to demonstrate the existing conflict between state and federal administrative remedies in that case was, itself, a *recognition that if no conflict had existed,* the state procedure would have survived. * * *" (Emphasis supplied.)

In *Weber v. Anheuser Busch,* 348 U. S. 468, 474-477, 479-480, the court took occasion to summarize its rulings on the "delicate problem of the interplay between state and federal jurisdiction touching labor relations" and again demonstrated that the major premise underlying federal pre-emption is conflict, actual or potential.[7]

The lower federal courts and state courts have also shown that as they understand the law laid down by this Court, conflict is the basis for allowing federal pre-emption and that in the absence of such conflict there is no pre-emption. See *U. E. v. Worthington Corp.,* 38 LRRM 2507, 2509, 2510 (C. C. A. 1) where the Court pointed out that "the basis of the [pre-emption] doctrine is the actual or potential conflict with N. L. R. B. adjudication that could arise were other tribunals to be permitted concurrent jurisdiction with duplicating remedies" and that "where

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[7] The Court's most recent decision in this field, *U. A. W. v. Wisconsin Employment Relations Board,* 351 U. S. 266, is to the same general effect.

the [National] Board would decline to exercise its statutory jurisdiction in deference to an available arbitral remedy, the basis for the pre-emption doctrine largely disappears, and it seems only logical that in such a case the lawful jurisdiction of the arbitrator be recognized." The court therefore upheld the jurisdiction of arbitrators to decide whether the dismissal of employees was for just cause under the applicable collective bargaining contract as against the contention that the matter was pre-empted to the jurisdiction of the National Labor Relations Board. This case is apt, notwithstanding it involved the jurisdiction of an arbitrator rather than that of a state court, for the doctrine of pre-emption, where applicable, applies equally to federal courts, state courts and agencies, and arbitration tribunals. *Weber v. Anheuser Busch,* 348 U. S. 468, 479; *Garner v. Teamsters Union,* 346 U. S. 485, 491; *Amazon Cotton Mills Co. v. Textile Workers Union,* 167 F. (2d) 183 (C. C. A. 4); *Aetna Freight Lines v. Clayton,* 228 F. (2d) 384 (C. C. A. 2); *U. E. v. Worthington Corp.*, 38 LRRM 2507, 2509.

Likewise showing that conflict is the basis for allowing federal pre-emption are *Born v. Laube,* 213 F. (2d) 407, *reh'g. den.* 214 F. (2d) 349 (C. C. A. 9), *cert. den.* 348 U. S. 855, *reh'g. den.* 348 U. S. 932; *International Union v. Underwood Corp.*, 219 F. (2d) 99 (C. C. A. 2); *N. L. R. B. v. Swift,* 130 F. Supp. 214 (E. D. Mo.), *aff'd. on other grounds* 233 F. (2d) 226 (C. C. A. 8); *Garmon v. San Diego Building Trades Council* (Calif.), 291 P. (2d) 1, 37 LRRM 2233, *cert. granted* 351 U. S. 923; *Guss v. Utah Board* (Utah), 296 P. (2d) 733, 38 LRRM 2137; *Adams Dairy v. Dairy Employees Union* (Mo.), 38 LRRM 2404, 2412 *et seq.*; *Minor v. Building Trades Council* (N. Dak.), 75 N. W. (2d) 139, 37 LRRM 2644, 2647 *et seq.*;

Milwaukee Store Company v. Hosiery Workers (Wisc.), 69 N. W. (2d) 762, 35 LRRM 2757, 2765 *et seq.*; *Machinists Union v. Goff-McNair Motor Co.* (Ark.), 264 S. W. (2d) 48, 33 LRRM 2641, 2643-2644; *Aladdin Industries v. Associated Transport* (Tenn. App.), 38 LRRM 2599, 2605-2609.

Applying the conflict rule to the case here, it is immediately apparent that there can be no conflict with federal authority where such authority lies dormant and unexercised and the federal Board has announced that it will not take jurisdiction over the matter. In such circumstances there is every reason to permit the state court to act and none to bar it from acting.

3. The Action of the State Court Here was Consistent With Federal Policy as Set Forth in the National Act.

We have heretofore contended that because the N. L. R. B. would decline to exercise jurisdiction in the premises here, for that reason alone the state court had jurisdiction to act. We do not believe that any more need be shown to establish state court jurisdiction. If it were necessary to go further and in each case show that state action was consistent with federal policy as set forth in the National Act, there would be imposed upon the Board the burden of policing the actions of the courts and administrative agencies of all the state and territories. But then the Board might just as well abandon its jurisdictional standards and take jurisdiction over all cases falling within the National Act. This, of course, would impose upon the Board a task so great that it would be unable to devote its energies to cases having a truly substantial impact upon the Nation's economy and it would thus be prevented from effectuating the policies of the Act.

Despite the foregoing, however, the fact is that the state court action here was consistent and not in conflict with federal policy as laid down in the National Labor Relations Act.[8]

The findings of the state Court of Appeals below are that the union here was a minority union representing at no time more than eighteen of Respondent's fifty employees (R. 159) and that less than ten of such eighteen actively interested themselves in the strike (*Id.*).[9] The findings of the courts below likewise are that the purpose of the picketing was to compel the Respondent to sign a union-shop agreement and thus force its employees to join the union (R. 151, 154-155, 159, 161-162, 163-165). These findings are amply supported by the testimony of record of witnesses for both sides (R. 16-17, 18, 20, 37-38, 39-40, 42-43, 47-48, 79, 116-118, 123-124, 126-127, 176 (Plaintiff's Exh. 2-B)). The trial court also found, in accordance with the evidence of record (R. 185-186 (Plaintiff's Exh. 12)), that of the fifty employees of Respondent, forty-one signed a statement several days after the picketing began that there was no labor dispute between them and Respondent, that they were not on strike and that they did

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[8] If it is for the N. L. R. B. and not the courts to decide what such federal policy is (see *Teamsters Local No. 25 v. N. Y., New Haven & H. R. Co.*, 350 U. S. 155, 161; *Weber v. Anheuser Busch*, 348 U. S. at p. 478), and the N. L. R. B. declines to consider the case and hence will not determine what such policy is, it would seem to follow that unless an aggrieved party is to be denied his day in court, a state court may act to protect him.

[9] The state Court of Appeals also found that while most of the employees who were union members stayed away from their jobs when the strike began, a few later returned to work and a few resigned their jobs (R. 159; see also R. 184, 185, 186 and 187 (Plaintiff's Exhs. 5, 11, 16 and 17)).

not favor Respondent signing an agreement which would compel them to join any union (R. 151).[10]

Since the union here was a minority union and the purpose of the picketing was to compel Respondent to coerce its employees into joining the union, it is clear that the picketing was not only unprotected, but actually proscribed, by the National Labor Relations Act.[11] Petitioners concede (Pet. Br., p. 48), as they must, that a union-shop demand is illegal under the National Act if the union lacks a majority. See *Garner v. Teamsters Union*, 346 U. S. 485, 487, 488-489, note 5; *Building Service Employees International Union v. Gazzam*, 339 U. S. 532.[12]

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[10] Contrary to Petitioners' statement (Pet. Br., p. 45), the state Court of Appeals did not rely upon this statement in finding that the union here was a minority union (R. 159). In fact that court did not even refer to such statement. That the union was a minority union was shown even by the testimony of the union's own witnesses (Tr. 116-118, 126-127).

[11] Section 8 (b) (2) of the Act makes it an unfair labor practice for a labor organization or its agents

> "* * * (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership * * *"

Subsection (a) (3) reads in part: "It shall be an unfair labor practice for an employer * * * (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *."

[12] The State Court of Appeals below found that picketing to compel an employer to coerce his employees to join a union is also unlawful under Ohio public policy and that this Court has approved the legality of such a state policy (R. 164). *Building Service Employees International Union v. Gazzam*, 339 U. S. 532. In two cases decided since the instant case, the Ohio Court of Appeals has affirmed such state policy. *Anderson v. Retail Clerks Local No. 698*, 30 Labor Cases ¶ 70158; *Cavett v. Machinists, District Lodge 34*, 30 Labor Cases ¶ 70161.

Moreover, the findings of the courts below also are that Petitioners engaged in secondary boycott activities, which are likewise proscribed by and unprotected by the National Labor Relations Act (R. 155-156, 165). See Section 8(b)(4)(A) and (B) of the Act. These findings are likewise amply supported by the testimony of record (R. 52-55).

Since then the picketing here involved was an unprotected and indeed proscribed activity under the National Labor Relations Act, there was no possible conflict between the policy of the federal act and the action of the state court in issuing an injunction against such picketing. See cases cited pp. 46-48, *supra*.[13] And if the National Board declines for policy reasons to act as here, the state court should be permitted to assume jurisdiction.

4. The Decided Cases Show that the State Court Had Jurisdiction to Proceed Here.

a. Court Decisions.

While, as already noted, this Court has itself not yet decided whether a state court may proceed where the National Board as a matter of policy declines jurisdiction, many state courts have dealt with that problem and, with minor exceptions, all have upheld the authority of the state court to act. For example, the Supreme Court of Utah recently decided the case of *Guss v. Utah Board*, 296 P. (2d) 733, 38 LRRM 2137, involving a union that had been certified by the National Board in 1952. When

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[13] As recently pointed out by a judge of the Ohio Court of Appeals, under the National Labor Relations Act picketing to compel an employer to designate a union as bargaining agent is an unfair labor practice (See Section 8(b)(2), *supra*, note 11) and is in *harmony with the Ohio* rule that such picketing is unlawful. *Cavett v. Machinists, District Lodge 34*, 30 Labor Cases ¶ 70161.

that union filed unfair labor practice charges against the employer in 1954, the Board dismissed those charges under its newly established jurisdictional standards. The union then filed charges with the state labor board which entered an order against the employer, who brought suit to review the question of whether the state board had jurisdiction. In an extremely well reasoned opinion the Utah state court held that the state board had jurisdiction for the following reasons:

a. The National Board has neither the time nor the money to administer the vast field entrusted to it and hence must select matters which it will handle on the basis of the effect upon national interests.

b. If the National Board determines that the matter is predominantly local, the interests affected must likewise be predominantly local and hence a matter for state regulation.

c. If the National Board declines to act and the state is prohibited from acting, a large segment of industrial relations is unregulated, contrary to the purposes of both federal and state acts, and the parties are left to self-help, which is disastrous to economy and internal peace.

d. There was no allegation in the case that either party was deprived of rights it might have obtained under federal law had the National Board taken jurisdiction, and there was no intimation that the National Board would have disposed of the case in a different way than the state board. No substantive conflict between the federal and state statutes was alleged nor did any appear as to the particular charges involved; i.e., discrimination against

union employees and refusal to bargain collectively.[14]

The Utah Supreme Court therefore concluded that there was no conflict with federal authority in the case and hence the state board was free to act.

The highest courts of several other states are in accord with the Utah Supreme Court. *Cain, Brogden & Cain v. Teamsters* (Tex.), 285 S. W. (2d) 942, 37 LRRM 2298 (injunction issued against secondary boycott picketing); *Garmon v. San Diego Building Trades Council* (Calif.), 291 P. (2d) 1, 37 LRRM 2233, *cert. granted*, 351 U. S. 923 (injunction against picketing to compel employer to sign a union-shop agreement); *Building Trades Council of Reno v. Bonito* (Nev.), 280 P. (2d) 295, 35 LRRM 2600 (injunction against listing plaintiff on unfair list in an effort to compel him to hire union help only). Several inferior courts are also in accord. *Hammer v. Textile Workers* (N. J. Superior Ct.), 111 A. (2d) 308, 34 LRRM 2812, 2819-2820; *Ringling Bros. v. Lewis* (N. Y. Sup. Ct.), 37 LRRM 2810 (injunction against picketing to compel employer to sign a union-shop contract); *Teamsters Local v. Merchandise Co.* (Ind. App.), 132 N. E. (2d) 715, 37 LRRM 2819 (injunction against picketing accompanied by misrepresentation); *Lee Mark Metal Manufacturing Co. v. Local 596* (Pa. Ct. Common Pleas, Phila. County), 38 LRRM 2219 (injunction against picketing accompanied by

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[14] While, as we have previously argued, we do not believe that in the circumstances here any more need be shown to establish state court jurisdiction than the fact that the National Board would decline for policy reasons to assert its jurisdiction, nevertheless, as we have already shown, in the instant case also the action of the state court was consistent with federal policy as set forth in the National Act. See *Weber v. Anheuser Busch*, 348 U. S. 468, 474; *Garner v. Teamsters Union*, 346 U. S. 485, 499-500.

threats); *School District v. Trades Council* (Cir. Ct., Ottawa County, Mich.), 37 LRRM 2232 (injunction against picketing at a construction site, the court holding that since the N. L. R. B. would not assert jurisdiction, plaintiffs must have some forum to turn to lest they be deprived of due process or equal protection of the laws. The court added that N. L. R. B. standards are notice to the profession that certain matters will not be heard by that body and to the extent that N. L. R. B. does not choose to assert jurisdiction there is no pre-emption.[15]

The cases relied upon by Petitioners at page 67, note 32 of their brief are in large measure distinguishable. To the extent they are not distinguishable, these decisions are based on the view that Section 10(a) of the National Act provides the only means of giving states authority within the purview of the National Act, and until there is a proper cession by the National Board to a State, the Federal Agency has exclusive jurisdiction. We shall demonstrate *infra*, pp. 56-57, that this position is untenable. Thus *Retail Clerks Local No. 1564 v. Your Food Stores*, 225 F. (2d) 659 (C. C. A. 10), simply held that a federal court judgment dissolving a state court injunction restraining picketing on the ground that the field had been pre-empted by the National Labor Relations Act was *res judicata* and could not be collaterally attacked in another state court action following the N. L. R. B.'s declination of jurisdiction. The court added by way of *dictum* a statement of the erroneous view that Section 10(a) of the National Act is mandatory and exclusive in effect. *Capital Service v.*

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[15] See also *N. L. R. B. v. Swift*, 130 F. Supp. 214 (E. D. Mo.), *aff'd. on other grounds* 233 F. (2) 226 (C. C. A. 8), where the federal court refused to interfere with a state court injunction granted against union picketing to compel the employer to force his employees to join the union, after the National Board had declined jurisdiction.

National Labor Relations Board, 204 F. (2d) 848 (C. C. A. 9) involved a company over which the Board had asserted jurisdiction, so that it was proper for the federal court at the Board's instance to enjoin a conflicting state court proceeding. The court's statement referred to by Petitioners (p. 67, note 32) cannot be considered therefore as passing upon the right of a state to act where the National Board declines jurisdiction altogether. *Graybar Electric Co. v. Automotive Union* (Mo.), 287 S. W. (2d) 794, 37 LRRM 2556, also cited by Petitioners, did not involve a case where the N. L. R. B. declined jurisdiction but rather a case where, as the Missouri Supreme Court held, the General Counsel of the Board dismissed charges of unfair labor practices on the merits. As for the decision of the circuit court of Michigan for Kent County in *Universal Car Company v. Machinists*, 35 LRRM 2087, likewise relied upon by Petitioners, it will be observed that subsequently another circuit court in Michigan held contrariwise to that court (*School District v. Trades Council*, Cir. Ct., Ottawa County, Mich., cited *supra*, p. 52). And the decision of the New York Supreme Court in *New York Board v. Wags Transportation System*, 130 N. Y. S. (2d) 731, 33 LRRM 2855, also referred to by Petitioners, was affirmed on appeal by the Appellate Division of New York only on the ground that there was no clear showing that the National Board would not have assumed jurisdiction. 284 App. Div. 883, 134 N. Y. S. (2d) 603. The New York State Labor Relations Board accordingly does not consider the state supreme court's decision as controlling in situations where it is clear that the National Board would not take jurisdiction, but on the contrary in such cases the New York Board does take jurisdiction. *Raisch Motors*, 35 LRRM 1631, 1632, note 2.

b. *State Labor Board Decisions.*

Seven state labor boards have considered the question of whether they will assert jurisdiction in cases where the National Board's jurisdictional standards are not met and therefore the National Board declines jurisdiction. All have held that in such cases they have jurisdiction:

(1) *Raisch Motors*, 35 LRRM 1631 (N. Y. State Labor Relations Board—automobile dealer involved); (2) *Walker Motors*, 36 LRRM 1290 (Mich. State Labor Mediation Board—automobile dealer); (3) *Ashland Motor Co.*, 37 LRRM 1116 (Wisconsin Employment Relations Board—automobile dealer);[16] (4) *Interstate Overall Service Inc.*, 37 LRRM 1431 (Mass. Labor Relations Comm.—overall cleaning company involved); (5) *Hilton Hotels*, 37 LRRM 1474 (Puerto Rico Labor Relations Board—hotel); (6) *Ideal Soap and Chemical Co.*, 38 LRRM 1043 (Pa. Labor Relations Board—dry cleaning supply business).[17] No state labor boards have taken a contrary position.

The reasons advanced by these boards as to why they have jurisdiction are worthy of note. The New York Board, for example, relied upon the absence of any potential conflict between it and the National Board. It added also that since labor disputes have an immediate and

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[16] The Wisconsin Board however does not take jurisdiction in a case where the National Board has asserted jurisdiction but has dismissed a representation proceeding on the ground that the requested bargaining unit is inappropriate because it includes only one employee. *Operating Engineers*, 38 LRRM 1431. In those circumstances the National Board's determination takes on the character of a decision like that involved in *Bethlehem Steel*, 330 U. S. 767, 774-775.

[17] The seventh board, which has also asserted jurisdiction in these circumstances, is the Utah Labor Relations Board. See *Guss v. Utah Board*, discussed *supra*, pp. 49-51, and involving a company which manufactured equipment for the Air Force.

direct effect upon the local community, they must be subject to state regulation or they would be totally unregulated in cases where the National Board declines jurisdiction. The state board also stated its opinion to be that when the National Board exercised the discretionary power given it by Congress to decline jurisdiction, Congress never intended in that circumstance to prevent the states from taking necessary steps to protect their own safety, health and welfare.

The reasoning of the Massachusetts and Puerto Rico Boards is similar to that of the New York Board, except that the Puerto Rico Board also made the point that it is precisely in the area of small business abandoned by the N. L. R. B. where labor organization is least developed and state intervention is most necessary.

It should also be emphasized that, as at least one of the state boards pointed out,[18] if Congress expressly excluded certain cases from the scope of the National Act, the states would be at liberty to act.[19] Consequently, the result must be the same where Congress, instead of doing that expressly, delegates the power to a federal agency to decline to act in given cases and the agency exercises that power. If this were not true, the authorized delegation of its power by Congress would have greater effect than the direct exercise of authority by Congress. And as pointed out by William Isaacson, General Counsel of the Amalgamated Clothing Workers of America, writing in the American Bar Association Journal, and speaking of cases where the National Board has declined jurisdiction

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[18] Puerto Rico Board in *Hilton Hotels*, 37 LRRM 1474.

[19] *Allen Bradley Local v. N. L. R. B.*, 315 U. S. 740 and *International Union v. Wisconsin Employment Relations Board*, 336 U. S. 245 make this clear.

"If state authority is foreclosed in those areas where the Federal Government has spoken because of the need for centralized administration and uniformity of rule, *there would seem to be no valid policy basis for excluding state action where the Federal Government speaking through its designated agency, has indicated that there is no need for any such centralized regulation or uniform control.*" (Emphasis Supplied) Isaacson, *Federal versus State Jurisdiction*, 42 A. B. A. J. 415, 484.

5. If State Court Jurisdiction is Barred under the Circumstances of This Case the Necessary Effect Is to Compel the National Board to Abandon Its Jurisdictional Standards and Accept Jurisdiction in All Cases Covered by the National Labor Relations Act Regardless of How Minor the Impact on Interstate Commerce. The Result of This Would Be to Cause a Frustration of the Proper Administration of the National Labor Relations Act.

As previously explained the National Board declines jurisdiction in many cases where it believes the impact upon interstate commerce is minor. The reasons for this declination of jurisdiction are, as the Board has pointed out, that it better effectuates the purposes of the Act and promotes the prompt handling of major cases. Moreover this Court has approved the Board's declining to take jurisdiction in some cases, saying:

"Even when the effect of activities on interstate commerce is sufficient to enable the Board to take jurisdiction of a complaint, *the Board sometimes properly declines to do so,* stating that the policies of the Act would not be effectuated by its assertion of jurisdiction in that case." (Emphasis supplied.) *N. L. R. B. vs. Denver Bldg. & Const. Trades Council,* 341 U. S. 675, 684.

See also *N. L. R. B. v. Indiana and M. Electric Co.,* 318 U. S. 9, 18, where this Court noted that the Board has

wide discretion in the issuance of complaints and is not required to move on every charge, but is merely enabled to do so. And see also *Brooks v. N. L. R. B.*, 348 U. S. 96, 104, note 16, where the Court noted the existence of the Board's 1954 jurisdictional standards and noted further that these standards "would place this case, if now brought, outside them." The federal Court of Appeals have likewise upheld the power of the Board, for policy reasons, to establish jurisdictional standards and decline to assert jurisdiction in cases not meeting those standards. *Haleston Drug Stores v. N. L. R. B.*, 187 F. (2d) 418 (C. C. A. 9), *cert. den.* 342 U. S. 815; *Optical Workers Union v. N. L. R. B.*, 227 F. (2d) 687 (C. C. A. 5), *reh'g. den.* 229 F. (2d) 170, *cert. den.* 351 U. S. 963; *Progressive Mine Workers v. N. L. R. B.*, 189 F. (2d) 1, 4-5 (C. C. A. 7), *cert. den.* 342 U. S. 868.

But if a state is precluded from acting in circumstances where the National Board declines jurisdiction, this Court, despite its approval of such self-denial by the National Board will in effect compel it to abandon its jurisdictional standards and take jurisdiction in all cases falling within the ambit of the National Act. Otherwise innocent parties who are victims of unlawful acts will have no remedy. On the other hand it is also obvious that an impossible situation will have been created. The Board with its limited budget and personnel cannot take jurisdiction in all cases and if it finds itself bogged down with many cases where the impact upon commerce is small, that will hinder it from carrying out the policies of the Act in much more important cases where really serious threats to interstate commerce are presented and frustrate the proper administration of the National Act.

Another practical consequence of the Court's denying state court jurisdiction here will be that the Board will be

compelled to abandon its policy of declining to act on unfair labor practice charges where an arbitral forum is available or an arbitration award has been made. *U. E. v. Worthington Corp.*, 38 LRRM 2507, 2510 (C. C. A. 1); *Spielberg Mfg. Co.*, 112 NLRB 1080, 36 LRRM 1152. As before noted, where pre-emption applies, it applies to arbitration tribunals as well as state courts.

These practical considerations obviously are the reason why the Board has taken the position, announced to this Court at p. 11 of its Memorandum filed in the *Laburnum* case, *supra*, p. 36, that

> "It [the Board] has, however, as a matter of practice repeatedly refrained from intervening in any way in situations where the States, despite the absence of any cession agreement, have taken action with respect to industries over which the Board as a matter of policy declines to take jurisdiction. See *Almeida Bus Service*, 99 N. L. R. B. 498, 500-501.[22]

"[22] The Board's practice in this respect is reflected in its action in *National Labor Relations Board v. New York State Labor Relations Board*, 106 F. Supp. 749 (S. D. N. Y.). There the Board sought to enjoin the New York State Labor Relations Board from taking jurisdiction over certain taxicab companies over which the Board has asserted jurisdiction. While the case was pending, the Board reconsidered its jurisdictional policy with respect to taxicab companies and concluded that it would refrain from asserting jurisdiction over the type of companies involved in the action against the New York Board. Following this change of policy, the National Board entered into a stipulation with the State Board dismissing the action in the district court."

And note also that in the instant case the Board's brief takes the position that despite the absence of a cession

agreement, where the Board declines jurisdiction for policy reasons, a state court may act.

We submit that the foregoing practical considerations inevitably lead to the conclusion that in circumstances where the National Board declines jurisdiction, the state may act.

6. Erroneous Arguments of Petitioners.

a. Petitioners contend (Pet. Br., pp. 31-32, 59-83) that Section 10 (a) of the National Labor Relations Act provides the only means by which states may assert jurisdiction in cases falling within the purview of that Act. Section 10 (a) provides as follows:

> "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce.[20] This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to

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[20] While the original National Labor Relations Act made this power of the Board to prevent unfair labor practices "exclusive," the Taft-Hartley amendments of 1947 omitted the word "exclusive." As pointed out by this Court in *U. A. W. v. Wisconsin Employment Relations Board*, 351 U. S. 266, 271, note 8, the omission was explained in the conference report (*H. Rept. No. 510*, 80th Cong., 1st Sess., p. 52; *Legislative History of the Labor Management Relations Act, 1947* (Gov't. Print. Off., 1948), p. 556) as being in recognition of (a) the jurisdiction vested in the federal courts by Sections 10 (j) and (l) of the Act to grant temporary injunctions against alleged unfair labor practices and (b) the provisions of Section 303 of the Act making unions suable in the courts in various secondary boycott situations. See also *Amazon Cotton Mills Company v. Textile Workers Union*, 167 F. (2d) 183, 187 (C. C. A. 4), which gives the same explanation as to the omission of the word "exclusive" and adds a reference to Section 208 of the Act, allowing the Attorney General to seek injunctions against strikes and lockouts in national emergency situations.

such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith."

Petitioners' argument is that only by a cession agreement between the N. L. R. B. and a state agency as provided in Section 10(a) may a state enter the field covered by the federal act. We submit that for the reasons which follow this argument is untenable.

(1) The proviso in Section 10(a) is limited by its terms to cases of cession agreements between the N. L. R. B. and state agencies. It assumes a situation in which the National Board asserts jurisdiction and provides the terms and conditions under which the National Board may cede that asserted jurisdiction to a state agency. But nowhere does it purport to deal with cases in which the National Board declines jurisdiction for policy reasons. In other words, Congress has delegated to the Board a broad field of jurisdiction under the National Labor Relations Act. But it is plain from Section 10(b) of the Act that the Board, while it has "power" to act in unfair labor practice charges, is not required to do so. *N. L. R. B. vs. Indiana & M. Electric Co.*, 318 U. S. 9, 18. When the Board declines jurisdiction altogether, it leaves the entire area free to state regulation and the Section 10(a) proviso has no application to that situation. Rather, that proviso applies only to cession by the Board to a state agency of the jurisdiction which the Board retains and not that which

it abandons altogether. Since that is true, there is no basis for implying as Petitioners suggest (Pet. Br., p. 68), that by specifying cession as a method whereby the states may acquire jurisdiction over matters committed to the Board, Congress thereby excluded the states from asserting jurisdiction under any other circumstances.

(2) Petitioners argue (Pet. Br., pp. 31-32) that the proviso to Section 10(a) would have been unnecessary if the Board's declination of jurisdiction in certain areas removed those areas from the Act's coverage, because cession would then be possible only in areas not "predominantly local in character" and the proviso itself allegedly contains an express prohibition against cession to the states in these circumstances. See also Petitioners' Brief, pages 67-68.

We submit that this argument is fallacious. First, we make no contention that the Board's declination of jurisdiction removes the cases so declined from the Act's coverage. The Board's reasons for declining jurisdiction are the policy ones set forth *supra*, page 46, and not that such cases do not fall within the Act's coverage. Elsewhere in their brief (p. 29) Petitioners recognize this, citing *East Newark Realty Corp.*, 115 NLRB No. 75, 37 LRRM 1328. The hotel industry is also an excellent example of an industry many of whose operations have a very strong impact upon commerce and yet for policy reasons the Board has constantly declined to assert jurisdiction. *Hotel Association of St. Louis*, 92 NLRB 1388, 27 LRRM 1243; *All Hotel Members of Miami Beach Hotel Association*, 36 LRRM 1447. Second, contrary to Petitioners' statement, the proviso does not forbid cession in cases of industries not "predominantly local in character." The prohibition is only against cession agreements with respect to "mining,

manufacturing, communications, and transportation" industries except where "predominantly local in character." On the other hand in other industries, such as for example large retailing, cession is permitted even though not "predominantly local in character" and even though in those industries the Board does assert jurisdiction. See Appendix B, pages 86-87, *infra*.

(3) As pointed out by the Ninth Circuit, in discussing the discretionary authority of the Board to decline to exercise jurisdiction in various cases:

> "By the express language of Section 10(a) the Board was and still is *empowered* (not directed) to prevent persons from engaging in unfair labor practices affecting commerce. *Its discretionary authority in respect of its assertion of jurisdiction was never, so far as we are informed, questioned under the act as it existed prior to 1947.* In *NLRB vs. Indiana & M. Electric Co.*, 318 U. S. 9, 18, 19, 63 S. Ct. 394, 400, 87 L. Ed. 579, the Court noted that 'The Board has wide discretion in the issue of complaints. * * * It is not required by the statute to move on every charge; it is merely enabled to do so.' [2] Consult also *Amalgamated Workers v. Consolidated Edison Co.*, 309 U. S. 261, 265, 60 S. Ct. 561, 84 L. Ed. 738. *The Board itself, without judicial challenge, acted on the assumption that it could, for reasons of policy or for budgetary or other reasons, decline to issue an unfair labor practice complaint,* or to dismiss a complaint after issuance without determining the existence of an unfair practice, *if in its reasoned judgment the policies of the act*

"[2] For the basis of this holding see § 10(b), which read: 'Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, * * * shall have power to issue * * * [a] complaint.' This verbiage remains unchanged in the section as it now exists." (Emphasis supplied) *Haleston Drug Stores v. N. L. R. B.*, 187 F. (2d) 418, 421, *cert. den.* 342 U. S. 815.

would be best served by that course. Of this assumption and practice one cannot doubt that Congress was fully cognizant."

And as stated by the Fifth Circuit, in a recent case also upholding the Board's discretionary authority to decline jurisdiction in various cases:

> "The National Labor Relations Board, even before the Taft-Hartley amendments gave it the task of policing a whole new set of unfair labor practices, was never able to assume its full jurisdiction. *Before 1950, its declinations of jurisdiction were avowedly on a case-by-case basis,*[21] and the Petitioners admit that this was within the Board's discretion. However, while these decisions were not made pursuant to any announced policy, they followed a course that all who were interested could soon easily predict." (Emphasis Supplied). *Optical Workers Union vs. NLRB*, 227 F. (2d) 687, 691, *reh'g. den.* 229 F. (2d) 170, *cert. den.* 351 U. S. 963.

It would seem therefore that Congress was fully aware, when it enacted Section 10(a) in 1947, of the Board's practice, for policy reasons, to decline to assert jurisdiction in many cases. Petitioners concede this (Pet. Br., pp. 30-31). See also the testimony of Chairman Herzog and General Counsel Denham of the Board before the Joint Committee on Labor Management Relations, established by Title IV of the Labor Management Relations Act, 1947, in which Messrs. Herzog and Denham reviewed at length the Board's practice in this regard under the original National Labor Relations Act prior to its amendment in 1947. *Hearings before Joint Committee on Labor*

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[21] See also Board Memorandum to this Court in the *Laburnum* case, where the Board stated (p. 5) that prior to 1950 its declinations of jurisdiction were on a case-by-case basis. The same statement appears in the Board decision in *Breeding Transfer Co.*, 110 NLRB 493, 35 LRRM 1020, 1021.

Management Relations, 80th Cong., 2nd Sess., pp. 1121, 1155-1156, 1157-1165.[22] Since "there is simply no evidence of a congressional purpose to take from the Board the power of dismissal on grounds having to do with the effectuation of the policy of the Act" (*Haleston Drug Stores vs. N. L. R. B.*, 187 F. (2d) 418, 422 (C. C. A. 9)), Congress' approval of the Board's practice is to be presumed. See in this connection Senator Taft's criticism of General Counsel Denham for the latter's desire to take jurisdiction over enterprises, no matter how small, if they affected commerce in whatever small degree, and his approval of the Board's contrary policy. *Hearings before Senate Committee on Labor and Public Welfare on S. 249*, 81st Cong., 1st Sess., p. 177.[23] There is also simply no reason to suppose that by Section 10(a) Congress was disapproving the correlative practice of state courts in assuming jurisdiction in that situation.

Petitioners, while conceding that Congress was aware when it amended the Act in 1947 of the Board's practice of declining to assert jurisdiction in many cases (Pet. Br., pp. 30-31), argue that Congress did not narrow the Act's coverage to conform to the limitations imposed by the Board on the exercise of its jurisdiction (*Id.*). While it is not clear what follows from this argument, it should be pointed out once again that the Act's coverage and the

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[22] See likewise the following, showing Congress' awareness of the Board's practice in this regard subsequent to 1947: *Report of Joint Committee on Labor Management Relations, S. Rept. 986*, 80th Cong., 2nd Sess., Part 3, pp. 11-13; *S. Rept. 99*, 81st Cong., 1st Sess., Part 1, p. 40; *H. Rept. 1852*, 81st Cong., 2nd Sess., p. 10; *N. L. R. B. 16th Annual Report (1952)*, pp. 15-39, 256-257.

[23] Other affirmative indications of approval by Congress of the Board's practice may be seen in *Hearings Before Senate Committee on Labor and Public Welfare on S. 249*, 81st Cong., 1st Sess., pp. 175-176; *H. Rept. 1852*, 81st Cong., 2nd Sess., p. 10.

extent to which the Board asserts jurisdiction are two different things. Because of the vagaries of business operations and the constant changes in our economy, Congress may want the National Board to have the authority to govern labor relations in all industries which may be reached under the Commerce Clause, but for the practical reasons spelled out by the Board in *Breeding Transfer Company*, 110 NLRB 493, 35 LRRM 1020, the Board may conclude that it should not assert jurisdiction in all such cases. And the Board may from time to time, as it has, change its views on how much of its allowable jurisdiction it should exercise. But the failure of Congress to restrict the Act's coverage to cases where the National Board asserts jurisdiction does not mean that Congress has thereby disapproved the states' stepping in to act where the National Board declines to do so.

(4) The purpose of the proviso to Section 10(a)—to allow cession agreements with states—was made necessary by this Court's decision in *Bethlehem Steel Co. vs. N. Y. State Labor Relations Board*, 330 U. S. 767, which appeared to outlaw such agreements under the original National Labor Relations Act. See *S. Rept. 105*, 80th Cong., 1st Sess., Part 1, p. 6 and Part 2, p. 38, *Legislative History of the Labor Management Relations Act, 1947* (Gov't. Print. Off., 1948), pp. 412, 500. This Court has recognized that this was the purpose of the proviso to Section 10(a). *Algoma Plywood & Veneer Co. vs. Wisconsin Employment Relations Board*, 336 U. S. 301, 313. But what was involved in *Bethlehem Steel*, as that case makes clear, was the problem of concurrent jurisdiction by the National and state labor boards over the same controversy. What Congress sought to do in Section 10(a) was provide a means whereby the National Board, although it possessed and

asserted jurisdiction in particular cases, might cede that jurisdiction to a state agency. The issue here is totally different, as this Court recognized in *Bethlehem Steel*, saying (330 U. S. at p. 776):

> "The election of the National Board to decline jurisdiction in certain types of cases, for budgetary or other reasons, presents a different problem which we do not now decide."

(5) As appears both from the language of the proviso to Section 10(a) and from its legislative history cession is allowed only where the state statute involved conforms to national policy. *H. Rept.* 510, 80th Cong., 1st Sess., p. 52, *Legislative History of the Labor Management Relations Act*, 1947, p. 556; *S. Rept.* 105, 80th Cong., 1st Sess., Part 1, p. 26, *Legislative History of the Labor Management Relations Act*, 1947, p. 432. What Congress was seeking therefore was to promote a uniform policy throughout the whole nation. The National Board has been unable to conclude cession agreements with any state agency because of failure to satisfy the statutory requirement that the relevant state law must not be "inconsistent" with the corresponding provision of the National Act or have received a construction "inconsistent therewith." *Board Memorandum* in *Laburnum* case, p. 3, referred to *supra*, p. 63. But this can hardly mean that where the Board itself declines jurisdiction in particular cases the state is powerless to act. The total absence of regulation in such cases would appear to conflict with the basic purpose of the National Act to promote industrial peace by means of government intervention. See Section 1 of the National Labor Relations Act.

As for Petitioners' argument (Pet. Br., p. 77) that the proviso to Section 10(a) acts as a spur to the states to bring their laws into conformity with the National Act,

we agree that this is so to the extent that the Board asserts jurisdiction in particular cases. But this is completely immaterial in cases where the Board declines jurisdiction, for then if the state acts there can be no conflict between the federal and state governments, and to preclude the states from acting leaves the parties in an economic jungle where might is right.

Petitioners argue (Pet. Br., pp. 69-72) that to permit the states to act where the Board declines jurisdiction defeats various objectives of the Taft-Hartley Act, such as ridding the labor movement of Communist leadership, fostering independent unions, allowing freedom of speech, and the like. Aside from the fact that these objectives are not being achieved in any event where the Board declines jurisdiction, it is plain that none of these matters is involved in the subject case. What is involved is a situation in which the union picketed Respondent's places of business for a purpose unlawful under both federal and state laws and the question of whether Respondent shall be remediless in that situation. It is unnecessary for this Court to decide other cases, conjured up by Petitioners, where there may be a conflict between state action and federal policy as enunciated in the Act.

(6) Petitioners argue that uncertainties result from allowing the state to take jurisdiction where the Board declines same, because the Board's jurisdictional standards change from time to time (Pet. Br., pp. 74-77). But in the first place, the Board's jurisdictional standards are not changed as frequently as Petitioners would have this Court believe. They were first codified in 1950 and not revised until July, 1954. Since that time they have remained static. Secondly, what Petitioners complain about is the inevitable consequence of applying fixed and pre-

determined standards to the operations of the Nation's various business establishments. In the dynamic field of labor relations it is necessary that from time to time the Board revise its jurisdictional standards in a constant effort to reach all operations having a truly substantial impact on our economy. At the same time the Board believes that it creates a greater degree of certainty for employers and unions to know in advance through its fixed standards what the cases are over which it will or will not assert jurisdiction. Merely because those standards may change hardly means that therefore the states should be precluded from asserting jurisdiction over various enterprises during a period when the National Board has announced that it will not take jurisdiction over them.

(7) That Section 10(a) was not intended to have the effect suggested by Petitioners is further shown by the following debate on the conference report which took place between Congressman Kersten and Congressman Hartley, chairman of the House Conferees and co-author of the bill.

"Mr. Kersten of Wisconsin. Mr. Speaker, will the gentleman yield?

"Mr. Hartley. I yield.

"Mr. Kersten of Wisconsin. I wish to compliment the gentleman on the very fine exposition he is making of the conference report. I would like to ask the gentleman about that portion which pertains to the validity of State laws. Wisconsin and other States have their own labor relations laws. We are very anxious that disputes be settled at the State level insofar as it is possible. Can the gentleman give us assurance on that proposition, so that it is a matter of record, that that is the sense of the language and of the report?

"Mr. Hartley. *That is the sense of the language of the bill and of the report. That is my interpretation of the bill, that this will not interfere with the State of Wisconsin in the administration of its own laws. In other words, this will not interfere with the validity of the laws within that State.*

"Mr. Kersten of Wisconsin. *And it will permit as many of these disputes to be settled at the State level as possible?*

"Mr. Hartley. *Exactly.*" (Emphasis Supplied) 93 Cong. Rec. 6540, *Legislative History of the Labor Management Relations Act, 1947*, p. 883.

(8) It is the sheerest sort of guesswork for Petitioners to contend (Pet. Br., pp. 77-79) that if Congress had intended to allow the parties another remedy where the National Board declines to act, it would have vested jurisdiction in the federal courts. Even in cases where the National Board would assert jurisdiction, this Court has allowed state court remedies. See *United Construction Workers v. Laburnum Construction Corporation*, 347 U. S. 656, 665-669; *U. A. W. v. Wisconsin Employment Relations Board*, 351 U. S. 266. Moreover, Petitioners' argument overlooks completely the basic principle that the subject of labor relations falls within state power and control except as Congress has plainly manifested its intent to exclude the states. See cases cited *supra*, pp. 17 and 18.

b. Petitioners' argument (Pet. Br., pp. 79-83), based upon the failure of Congress to repeal the proviso in Section 10(a), is equally untenable. We have already shown that the Section 10(a) proviso was intended to deal with cases in which the N. L. R. B. asserts jurisdiction and not to those in which it declines jurisdiction. Accordingly failure to repeal such proviso shows at most only that Congress does not wish the N. L. R. B. to enter

into cession agreements with a state unless the state law conforms to national policy in all respects.

Moreover, Petitioner relies in part upon an early and preliminary report of the Joint Committee on Labor Management Relations (*S. Rept. No. 986*, 80th Cong., 2nd Sess., Part 1, pp. 30-31). See Petitioners' Brief, pp. 80-81. But when following public hearings, that Committee made its final report, it said:

> "The committee believes that small local businesses, retail and service establishments, should not be subject to the Act. * * * The most obvious approach, if the jurisdiction of the Board is to be clearly defined, is a mathematical one. The number of persons employed and the volume in dollar value of sales to out-of-state customers are facts which may be ascertained with accuracy. If such a limitation is desirable, the committee recommends use of number of employees in combination with interstate sales." (*S. Rept. 986*, 80th Cong., 2nd Sess., Part 3, pp. 14-15.)

And soon thereafter the Board on its own motion adopted mathematical jurisdictional standards (Appendix A, *infra*, pp. 79-80). It is significant that Congress has not since legislated upon this subject, so that if any inference at all is to be drawn from Congressional inaction, it is that Congress has acquiesced in the Board's establishment of jurisdictional standards and in the state courts assuming jurisdiction in those circumstances.

In any case the inferences Petitioner suggests may not be drawn from "incompleted steps in the legislative process." *Wong Yang Sung v. McGrath*, 339 U. S. 33, 47.

In 1949 the Senate, following lengthy hearings before its Labor Committee (*Hearings on S. 249*, 81st Cong., 1st Sess.) and both majority and minority reports of that Committee (*S. Rept. 99*, 81st Cong., 1st Sess., Parts 1

and 2), passed a bill which would have amended the National Labor Relations Act extensively. 95 Cong. Rec. 8717. This bill, *among many other things*, would have eliminated the proviso to Section 10(a). See *S. Rept. 99*, 81st Cong., 1st Sess., Part 2, p. 75.[24] The House in 1949 considered a bill to repeal the Act (*H. R. 2032*, 81st Cong., 1st Sess.) and its Labor Committee filed a report thereon (*H. Rept. 317*, 81st Cong., 1st Sess., 95 Cong. Rec. 3146), but such bill was recommitted to Committee (95 Cong. Rec. 5597) and the House never took any action on the Senate-passed bill. Again in 1954 the Senate Labor Committee, after extensive hearings in 1953 (*Hearings on S. 225 et al.*, 83rd Cong., 1st Sess.), reported a bill (*S. 2650*, 83rd Cong., 2nd Sess.) to amend the Act *in many respects*, including an amendment specifically permitting the states to act where the National Board declines jurisdiction. *S. Rept. 1211*, 83rd Cong., 2nd Sess., p. 28. At the same time this bill left untouched the proviso to Section 10(a) (*S. Rept. 1211*, 83rd Cong., 2nd Sess., p. 33), thus showing that the Committee did not believe that Section 10(a) itself precluded a state from taking jurisdiction in a case where the National Board declined jurisdiction. S. 2650, however, was recommitted to Committee, 100 Cong. Rec. 6203. The House Labor Committee also held hearings in 1953 on various proposals to amend the Act (*Hearings pursuant to H. Res. 115*, 83rd Cong., 1st Sess.), but never reported a bill.

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[24] The bill, as passed by the Senate, had been recommended in the minority report of Senators Taft, Smith, and Donnell of the Senate Labor Committee on S. 249. *S. Rept. 99*, 81st Cong., 1st Sess., Part 2. See 95 Cong. Rec. 8717. Significantly, such minority report (p. 8) expressed the view that

> "We believe it desirable that in those border-line cases where interstate commerce is only remotely affected and the industry is essentially local in character the National Board should not take jurisdiction in any event."

Aside from the bill passed by the Senate in 1949, at no time after 1947 did either House pass any bill to amend the National Labor Relations Act, except for the non-controversial bill which Congress did enact in 1951 the major purpose of which was to eliminate the requirement for union shop authorization elections before an employer and a union might agree to a union shop provision in a collective bargaining contract. See *Public Law 189*, 82nd Cong., 1st Sess., Ch. 534, approved October 22, 1951, 65 Stat. 601.

In the above circumstances where the most that ever happened was that one House of Congress once passed a bill that would have eliminated the proviso to Section 10(a) and a Committee once reported a bill that would have specifically permitted the States to act when the National Board declines jurisdiction (but left Section 10(a) unchanged), and in each case this matter was just one of a whole series of proposed amendments to the Act, no inference in favor of Petitioners' construction of Section 10(a) can be drawn. *Cf. Wong Yang Sung v. McGrath*, 339 U. S. 33, 47-48, where, speaking of an attempt specifically to exempt the Immigration Service from the Administrative Procedure Act, this Court said that no inference could be drawn

> "from the Department's request for legislative clarification, from the congressional committees' willingness to consider it, or from Congress' failure to enact it."

c. Petitioner relies (Pet. Br., p. 37) upon *United Mine Workers v. Arkansas Oak Flooring Co.*, 351 U. S. 62, and particularly upon the following paragraph in that case:

> "The industrial relations between the company and its employees nonetheless affect interstate com-

merce and come within the field occupied by the National Labor Relations Act, as amended. The Labor Board is but an agency through which Congress has authorized certain industrial relations to be supervised and enforced. The Act goes further. The instant employer, employees and union are controlled by its applicable provisions and all courts, state as well as federal, are bound by them." *Id.*, p. 74.

But, of course, the words in this Court's opinion are to be read in the light of the facts of the case under discussion.[25] All that that case held is that a state court may not enjoin peaceful union picketing protected by Section 7 of the National Labor Relations Act, on the ground that the Union was not in compliance with Sections 9(f), (g) and (h) of the Act, requiring unions to file certain data with the Secretary of Labor and non-Communist affidavits with the Board. There was no question but that the employer in the case affected commerce and came within the Board's jurisdictional standards. 351 U. S. at p. 65. And the Court made it quite clear that if the Union had in fact violated the Act, its noncompliance with Sections 9(f), (g) and (h) would not have precluded the Board from proceeding against it. 351 U. S. at p. 70, note 5. The effect of noncompliance was simply to deny the Union access to the Board's processes. *Id.* at pp. 69-70, 73, 75.

The case here is totally different because the employer's business does not meet the Board's jurisdictional

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[25] See *Armour v. Wantock*, 323 U. S. 126, 132-133 where the Court said:

> "It is timely again to remind counsel that words of our opinions are to be read in the light of the facts of the case under discussion. To keep opinions within reasonable bounds precludes writing into them every limitation or variation which might be suggested by the circumstances of cases not before the Court. General expressions transposed to other facts are often misleading."

standards and the Board would therefore decline jurisdiction, whether of an unfair labor practice charge against the employer or one against the union. Moreover, here the union's activity, unlike that in the *Arkansas Oak Flooring* case, was not protected by the Act, but was indeed proscribed by it.

We submit that the Court did not intend by the foregoing general expression in the *Arkansas Oak Flooring* case to decide the problem now posed in this case and on which this Court had carefully reserved decision in two recent cases. *Kinard, supra,* pp. 32 and 33.[26] We further submit that for the reasons previously detailed, where the National Board decides that it would not effectuate the policies of the Act to go into certain areas, there is no basis in logic or authority for holding that the National Act in and of itself pre-empts such areas. This is particularly true in the light of the fact that the Act is not self-generating, but requires the filing of a charge before the Board may act, and the Board even then has discretionary authority to refuse to proceed. Section 10(b) of the Act; *N. L. R. B. v. Indiana & M. Electric Co.*, 318 U. S. 9, 18.

d. Petitioners, citing Section 14(a) of the National Labor Relations Act and Sections 301 and 303 of the Labor Management Relations Act, 1947, appear to argue that since those sections are operative whether or not the Board asserts jurisdiction in a given case, therefore in

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[26] The same is true of the general expressions of this Court to be found in *Amalgamated Ass'n. etc. v. Wisconsin Employment Relations Board*, 340 U. S. 383, 397-398, also relied upon by Petitioners (Pet. Br., pp. 65-66). That case struck down a Wisconsin Public Utility Anti-Strike Act providing for compulsory arbitration. The utility company there involved was one over which the National Board exercised jurisdiction. 340 U. S. 383, 392, note 14.

the instant case the state court has no jurisdiction to enjoin the picketing involved, even though the National Board would decline jurisdiction (Pet. Br., pp. 38-40). It will be noted, however, that the National Board has nothing to do with the administration of the cited sections. Its action or inaction in no way determines whether such sections apply in given circumstances. And indeed so far as Section 14(a) is concerned, it contains a clear expression by Congress that the subject matter covered by it is pre-empted by Congress to the exclusion of the states.

In cases such as that at bar on the other hand, involving unlawful union picketing, assuming that interstate commerce is affected, the National Board has discretionary authority to proceed or not proceed. The administration of the act with respect to unfair labor practices is in its hands. Only through its action can an employer or union obtain relief against unfair labor practices. And if it decides for policy reasons that it will not enter a particular case, it would appear to follow logically that the states are not excluded from that case.

PETITIONERS PROPOSE AN UNCONSTITUTIONAL INTERPRETATION OF THE ACT CONTRARY TO THE DECISIONS OF THIS COURT AND COMPLETELY FAIL TO JUSTIFY THE DENIAL OF DUE PROCESS THAT WOULD RESULT.

We have demonstrated at considerable length that denial of the right of the states to exercise their inherent jurisdiction in this area where the Board has refused to assert federal jurisdiction thus negating any potential conflict, as petitioners propose, would lead to the creation of an intolerable jural vacuum in which due process of law would be denied. Petitioners recognize that this is

in fact the inevitable result of the position they urge upon the Court in this case, but they dismiss the whole problem with a casual brush-off equivalent to "c'est la guerre." (Petitioners' Brief, paragraph E, pp. 10-11; p. 21; paragraph No. 7, p. 77; paragraph No. 9, p. 79.)

Thus, petitioners recognize that parties (employer, employee, and union alike) over whom the Board declines to assert jurisdiction "are left without a remedy." They might have added that such parties are also left without a day in court, an opportunity to be heard, a chance for judicial review, or any other essential element of due process. But, say petitioners, this is not Congress' fault; "that result is attributable only to the states" who failed to fulfill "Congress' hope and anticipation" that they would cure the defects in its legislation by passing consistent little Taft-Hartley Acts so that the Board could thus peddle portions of its jurisdiction through numerous section 10(a) cession agreements (Br. pp. 10, 21, 22). Petitioners proclaim that if the states had passed such laws

> "there could be no room for the argument that the Board's declination to assert jurisdiction leaves anyone without remedy." (Pet. Br. p. 10, emphasis added.)

This could be true, they assert, because if such laws had been passed, the Board *could have* executed Section 10(a) cession agreements with them and

> "had the Board thus ceded its jurisdiction, there could have been no room for the argument that the Board's declination leaves parties remediless." (Pet. Br. p. 79, emphasis added.)

First, we might mention the obvious by noting that since none of petitioners' suggested "ifs" came to pass,

there definitely does remain abundant "room for the argument" that due process would be denied and a jural vacuum would be created by adoption of petitioners' theories. The propriety of our due process argument follows as a necessary result of petitioners' own admissions (Pet. Br. p. 22).

Second, before petitioners' proposed method of curing the constitutional defect they seek to read into the federal Act could become effective, it would be necessary for *all* 48 states and *all* territories to enact such laws, or the fatal void would continue to exist at least partially. In view of the fact that no state or territory whatsoever has so acted and no cession agreements have ever been made in the decade since the passage of the Act, it would seem that the "hope and anticipation" which petitioners ascribe to Congress was ill-advised.

Third, we submit that the constitutionality of congressional legislation, whether it satisfies the constitutional requirement of due process, cannot be made to depend on the forlorn hope that the states will unanimously enact curative state laws. Nor can constitutional shortcomings in such legislation be waived or excused because the states declined to effect the rescue.

Fourth, the prior decisions of this Court holding the Act valid were reached specifically because the Act did not permit any such judicial vacuum or denial of due process. The void which petitioners try so hard to justify by attributing it to state inaction only exists if petitioners' erroneous theory of total pre-emption is adopted.

Thus, only by the exercise of state jurisdiction in the area abdicated by the Board will all federally guaranteed rights be fully protected. Moreover, this is an historic, recognized method of doing so. In *Amalgamated Clothing*

Workers v. Richman, 348 U. S. 511, the union sought to induce the federal courts to interfere with Ohio's exercise of jurisdiction in a labor relations case because "federal rights will not be adequately protected in the state courts." This court rejected that contention noting that historically Congress "in the main relied on the adequacy of the state judicial systems to enforce federal rights." The court further noted that in revising the Judicial Code in 1948 Congress had expressed its "continuing evidence of confidence in the state courts."

Petitioners' contention that state procedures must be denied because federal rights will suffer has thus been specifically refuted by this Court in the *Richman* case. If federal rights were to suffer in the area abdicated by the Board, it would be by denial of state jurisdiction, not by its exercise. The only tribunal available to protect such rights is the state court, which must do so, "subject to review by this court." *Amalgamated Clothing Workers v. Richman, supra.*

CONCLUSION.

It is respectfully submitted that the judgment below should be sustained.

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APPENDIX A.

N. L. R. B. Jurisdictional Standards—1950.

National Labor Relations Board

October 6, 1950 No. 342

N. L. R. B. Clarifies and Defines Areas in Which It Will and Will Not Exercise Jurisdiction

"The National Labor Relations Board today announced the establishment of standards which will govern its exercise of jurisdiction under the Taft-Hartley Act.

"The various 'yardsticks' which will be used by the Board in future cases involving all enterprises were set forth in eight unanimous decisions issued simultaneously. Pointing out that these standards 'reflect, in large measure, the results reached in the Board's past decisions disposing of similar jurisdictional issues,' the Board said:

> " 'The time has come when experience warrants the establishment and announcement of certain standards which will better clarify and define where the difficult line can best be drawn.
>
> " 'The Board has long been of the opinion that it would better effectuate the purposes of the Act, and promote the prompt handling of major cases, not to exercise its jurisdiction to the fullest extent possible under the authority delegated to it by Congress, but to limit that exercise to enterprises whose operations have, or at which labor disputes would have, a pronounced impact upon the flow of interstate commerce. This policy should, in our opinion, be maintained.'

"The Board thereby reiterated its policy of not exercising jurisdiction, despite its power to do so, over business operations so local in character that a labor dispute would be unlikely to 'have a sufficient impact upon interstate

commerce to justify an already burdened Federal Board in expending time, energy and public funds.'

"The plan that emerged from the eight decisions made it clear that whenever federal jurisdiction exists under the statute and the interstate commerce clause of the Constitution the Board will exercise jurisdiction over:

"1. Instrumentalities and channels of interstate and foreign commerce (for example, radio systems).

"2. Public utility and transit systems.

"3. Establishments which operate as integral parts of a multistate enterprise (for example, chain stores, and branch divisions of national or interstate organizations).

"4. Enterprises which produce or handle goods destined for out-of-state shipment, or performing services outside a state, if the goods or services are valued at $25,000 a year.

"5. Enterprises which furnish services or materials necessary to the operation of enterprises falling into categories 1, 2 and 4 above, provided such goods or services are valued at $50,000 a year.

"6. Any other enterprise which has:

(a) a direct inflow of material valued at $500,000 a year; or

(b) an indirect inflow of material valued at $1,000,000 a year; or

(c) a combination inflow or outflow of goods which add up to at least a total of '100%' of the amounts required in items 4, 5, 6(a) and (b) above.

"7. Establishments substantially affecting national defense."

APPENDIX B.

N. L. R. B. Jurisdictional Standards—1954.

National Labor Relations Board

July 15, 1954 R-449

N. L. R. B. Announces New Standards for Exercise of Jurisdiction

"The National Labor Relations Board today [July 15, 1954] established new standards for determining whether the Board will take jurisdiction over cases involving retail stores, utility companies, transit systems, radio and television stations, newspapers, certain types of interstate companies, industrial service companies, and companies engaged in national defense work.

"The Board indicated that these changes will substantially complete the revision of its jurisdictional standards.

"The Board also announced that it will no longer take cases involving public restaurants.

"The Board has discretion to decide in which cases, of those affecting interstate commerce, it will exercise jurisdiction.

"The standards announced today are in addition to the new standards announced by the Board June 30, 1954. Those announced today also modify earlier standards adopted by the Board in October 1950. The changes announced today follow:

"A. For retail stores, the Board established two standards—one to govern in cases involving stores operating entirely within one state and the other to govern in cases involving chain stores operating in more than one state. The new standards are:

(1) A single independent retail store or a chain of stores operating entirely within one state will not come under the Board's jurisdiction unless the store involved in the case has

(a) purchases amounting to at least $1,000,000 a year coming to it directly from outside the state, or

(b) purchases of $2,000,000 a year coming to it indirectly from outside the state, or

(c) if the store ships $100,000 worth of merchandise into other states.

(2) A store which is part of a chain operating in more than one state will come under Board jurisdiction if

(a) the store meets either of the standards listed in (1) for intra-state stores, or

(b) the gross sales of the chain amount to $10,000,000 or more per year.

"(The former standards for stores were $500,000 a year direct purchases or $1,000,000 indirect purchases, or $25,000 a year sales made outside the state.)

"B. The Board announced that it would assert jurisdiction over radio and television stations only if their gross revenue amounts to at least $200,000 a year, and newspapers only if their gross revenue amounts to at least $500,000 a year.

"(The former standards placed no limit on jurisdiction of broadcasting stations or newspapers if their operations affected interstate commerce.)

"C. As to utility companies, such as power, gas, and water companies, and intrastate public transit systems, the Board announced that it would assert jurisdiction over such companies only if the company does a gross business of $3,000,000 a year or more.

"Interstate transit systems will come under Board jurisdiction if their gross revenue from interstate operations amounts to at least $100,000 a year. (The Board does not have jurisdiction of railroads and airlines.)

"(The Board formerly took jurisdiction of all utility and transit systems whose operations affected interstate commerce.)

"D. Companies engaged in business related to the national defense will come under Board jurisdiction when their business meets three tests:

(a) The goods or services supplied relate directly to the national defense.

(b) Such goods or services are furnished pursuant to a government contract.

(c) Value of these goods or services amounts to at least $100,000 a year.

"To come within the Board's jurisdiction, such companies must meet all three tests, the Board announced.

"(The Board formerly took jurisdiction of any company doing any work 'affecting' national defense.)

"E. Jurisdiction over multistate enterprises, other than retail and service establishments, will be governed by the following tests:

(1) To qualify, the plant involved must meet the outflow tests ($50,000 a year in direct outflow or $100,000 a year in goods furnished to an interstate company) or the inflow tests ($500,000 a year in purchases coming to it directly from outside the state where it is located or $1,000,000 a year coming to it indirectly from outside the state).

(2) If the plant involved does not meet these tests, jurisdiction will nevertheless be asserted if the multistate

enterprise, of which the plant is a part, has a total outflow of goods into interstate commerce totalling $250,000 a year, taking the outflow of all its plants together.

"F. Companies which supply services to interstate companies will come under the jurisdiction of the Board only if they meet the following tests:

(a) An independent establishment must furnish services amounting to at least $200,000 a year (formerly $50,000) to certain types of interstate companies.

(b) If the establishment is part of a multistate enterprise, jurisdiction will be asserted over any one establishment of the enterprise if the enterprise furnishes services amounting to $1,000,000 a year to interstate concerns.

"The Board announced that these changes in its jurisdictional standards will take effect immediately. The new standards will be applied to cases pending before the Board as well as to those filed hereafter.

"The changes indicated were made by majority vote in specific cases; the Board was not unanimous. Dissents will be included in the decisions as they issue.

"With today's new standards and the earlier amendments, the Board now will assert jurisdiction over the following types of companies:

"1. Instrumentalities and channels of commerce, interstate or foreign, except that:

Jurisdiction will be exercised over intrastate trucking companies and similar firms which are links in interstate commerce only if they do at least $100,000 worth of business annually for other concerns in categories numbered 1, 2, or 4.

Jurisdiction will be asserted over radio and television stations only if their gross annual revenue amounts to at least $200,000 and over newspapers only if their gross annual income amounts to at least $500,000.

"2. Public utility and transit systems:

(a) Local power, gas, and water utilities and local or intrastate public transit systems only if the company does a gross annual business of $3,000,000 or more.

(b) Public transit systems engaged in interstate commerce if the gross annual revenue from interstate operations amounts to at least $100,000.

"3. An establishment operating as an integral part of a multistate enterprise, other than a retail or service establishment, if one of the following tests is met:

(a) The plant involved has a direct outflow of goods into interstate commerce amounting to $50,000 a year (thus meeting the standard of category 4) or furnishes goods to the value of $100,000 a year to interstate concerns coming within categories 1, 2, or 4 of this list, or

(b) If the plant involved does not meet the separate plant tests listed in (a) above, jurisdiction will be asserted if the multistate enterprise, of which the plant is a part, has a total outflow of $250,000 a year into interstate commerce.

"Jurisdiction will not be exercised over an establishment solely because it is operating under a franchise from a national enterprise. Jurisdiction will be exercised over franchised establishments only if they satisfy some other standard in this plan.

"4. Enterprises other than retail stores, producing or handling goods destined for out-of-state shipment or performing services outside the state in which the firm is located, where such goods or services are valued at $50,000 a year.

"5. Enterprises furnishing goods or services that become a part of the stream of commerce amounting to $100,000 a year or more to concerns in categories 1, 2, or 4, except that:

Jurisdiction will not be exercised over enterprises supplying materials to other firms which do interstate business unless the materials themselves ultimately go outside the state.

"6. Enterprises furnishing services, other than those in category 5, amounting to $200,000 a year or more to concerns in categories 1, 2, 4, or if the establishment involved is part of a multistate chain, jurisdiction will be exercised if the chain furnishes services amounting to $1,000,000 or more per year to concerns in categories 1, 2, or 4, except that:

Jurisdiction will not be exercised over general or public office buildings merely because such buildings have tenants over which the Board takes jurisdiction.

"7. Enterprises other than retail establishments which have a direct inflow of goods or materials from out of state valued at $500,000 a year or more.

"8. Enterprises, other than retail establishments, with an indirect inflow of goods or materials valued at $1,000,000 a year or more.

"9. Retail stores:

(a) Independent retail stores, whether a single store or part of a chain operating entirely within a state, only if

(1) the store involved in the case has annual purchases amounting to at least $1,000,000 coming to it directly from outside the state, or

(2) the store involved has annual purchases of $2,000,000 coming to it indirectly from outside the state, or

(3) if the store ships $100,000 worth of merchandise into another state or states.

(b) Chains of retail stores, with stores in more than one state, only if

(1) the individual store involved meets either of the tests for intrastate stores, or

(2) the chain has gross annual sales totalling $10,000,00 or more.

"Jurisdiction will not be exercised over public restaurants regardless of source and volume of materials and regardless of whether the restaurant is part of a multi-state chain.

"10. Establishments affecting the national defense, where the goods or services furnished are directly related to national defense, and amount to at least $100,000 annually and are furnished pursuant to a government contract."

INDEX

	Page
Argument	2
I. State Jurisdiction; but No Deprivation of Substantive Federal Rights	3
II. State Jurisdiction Over Classes of Cases	6
III. State Assumption of Jurisdiction After Application to Federal Board	13
IV. No State Jurisdiction	19
Conclusion	23

Citations

Cases:	
Air Line Pilots Association, 97 NLRB 929	11
Armour Research Foundation of Illinois Institute of Technology, 107 NLRB 1052	9
Breeding Transfer Company, 110 NLRB 493, 500, 508, 527	7, 11, 12, 19
Building Trades Council v. *Kinard Construction Company*, 346 U.S. 933, 74 S. Ct. 373	6
California Institute of Technology, 102 NLRB 1402	9
Checker Cab Company, 110 NLRB 683	11
Deskins Super Market, Inc., 115 NLRB No. 252	10
Fienberg Furniture Co. v. *DiFede*, 38 LRRM 2493 (NY S. Ct. 1956)	16
Garner v. *Teamsters Union*, 346 U.S. 485, 491	3, 5
Gary Hobart Water Corp., 115 NLRB No. 253	10
Hotel Members of Miami Beach Hotel Association, 36 LRRM 1447 (1955)	9, 11, 23
International Brotherhood of Teamsters, etc., and McAllister Transfer, Inc., 110 NLRB 1769 (1954)	9
Local Union No. 830, Brewery and Beer Distributors, Drivers, Helpers and Platform Men, etc. (Earl Vann), 106 NLRB 405 (1953)	10
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PAGE

Oregon Teamsters' Security Plan Office, 113 NLRB 987, aff'd 38 LRRM 2269 (CA DC, 1956) 9, 11

Philadelphia Orchestra Association, 97 NLRB 548 9

Retail Clerks Local No. 1564 v. Your Food Stores, 225 F. 2d 659, 663 12

San Diego Building Trades Council v. *Garmon*, No. 50, October Term, 1956, United States Supreme Court 2

Thomas Jefferson, Inc. v. *Hotel Employees*, 84 So. 2d 583, 37 LRRM 2338 (Fla. 1956) 23

Truck Drivers Local Union No. 649, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL (Jamestown Builders Exchange, Inc.), 93 NLRB 386 (1951) 10

Trustees of Columbia University in the City of New York, 97 NLRB 424 9

United Mine Workers v. *Arkansas Oak Flooring*, 351 U.S. 62 3

Universal Car Co. v. *Association of Machinists*, 35 LRRM 2087, 2098 (Cir. Ct. Mich. 1954) 12

Weber v. *Anheuser-Busch, Inc.*, 348 U.S. 468, 478-9 ..... 4, 5

Statutes

National Labor Relations Act:

Section 7 ..... 3, 4, 22

Section 8 ..... 4, 22

Section 8(a)(3) 4

Section 8(b) 4

Section 8(b)(4) 4

Section 9(f), (g), (h) 18

Section 10(a) 2, 19, 22, 23, 25

Section 10(b) 18

United States Code, Title 28, Sec. 1257(2) 5

Miscellaneous

Labor Relations Reference Manual, Vol. 26, p. 79 24

PAGE

National Labor Relations Board:
Administrative Decisions of General Counsel: K-637, K-638, Sept. 13, 1956 18
Nineteenth Annual Report (1954), pp. 2-5 ..... 7, 11
S. 1264, 83rd Cong., 1st Sess. 22
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

NO. 41

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, LOCAL NO. 427, AFL, et al.,

vs.

FAIRLAWN MEATS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

This brief is submitted by the AFL-CIO, firstly, because of the importance of the issue presented in this case to all

labor unions. It is submitted, secondly, because the AFL-CIO and its affiliated unions have had considerable experience with various practical aspects of the issue before the Court, which we think may be of value to the Court.

ARGUMENT

The broad issue presented in this case and in the companion case of *San Diego Building Trades Council* v. *Garmon*, No. 50 this Term, is whether the States may assume jurisdiction over cases which are within the statutory jurisdiction of the National Labor Relations Board, but which the federal Board declines in its asserted discretion to handle. We will not duplicate the legal arguments of the parties to the case on this issue, but will confine ourselves rather to discussing the practical consequences which will flow from this Court's decision.

There are at least four conceivable dispositions which the Court may make of the issue before it:

(1) It may hold that the States may occupy the area vacated by the federal Board, except that they may not restrict substantive rights conferred by the Labor-Management Relations Act, 1947.

(2) It may hold that the States may assume jurisdiction over any class or category of cases which the federal Board has announced it will not handle.

(3) It may hold that the States may assume jurisdiction only over an individual case after application has been made to the federal Board and it has refused to assume jurisdiction.

(4) It may hold that the States may not assume jurisdiction over any part of the area evacuated by the federal Board, except pursuant to a cession agreement entered into under Section 10(a) of the federal Act.

It would, of course be possible for the Court to combine (1) with either (2) or (3).

We will consider, seriatim, how each of these four possible holdings might work in practical operation.

I

State Jurisdiction: But No Deprivation of Substantive Federal Rights

We will first consider how a ruling by this Court that the States may occupy the area vacated by the federal Board, but that they may not transgress substantive rights conferred by the federal Act, might work in actual operation.

Without going into the question in detail, it clearly would be most difficult, from the standpoint of legal theory, for the Court to hold that the States are free to transgress these federal substantive rights. The Court has already held that the States may not ignore these federal rights, either on the theory that they are public rights only (*Garner* v. *Teamsters Union,* 346 U.S. 485), or because of the lack of a federal remedy (*United Mine Workers* v. *Arkansas Oak Flooring,* 351 U.S. 62).

On the other hand, a doctrine that the States may assume jurisdiction, but may not restrict substantive rights conferred by the federal Act, would encounter serious difficulties in actual operation.

Such a doctrine might be workable if the substantive federal rights were precise and clear cut, and if their existence could be determined in isolation from the adjudication of other federal issues. But such is not the case.

Section 7 of the National Labor Relations Act, which grants certain broad substantive rights to employees and their unions, is anything but precise. It reads:

"RIGHTS OF EMPLOYEES

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives

> of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

This general language gains specific content as it is applied on a case-by-case basis by the federal Board and the reviewing federal courts.

Further, the general language of Section 7 is conditioned and restricted by numerous other provisions of the federal Act, including particularly Section 8(b), which proscribe as unfair labor practices various types of employee and union activity which would otherwise fall within the sanction of Section 7. Section 7, for example, in general accords to employees the right to strike and picket, but those rights are subject to numerous qualifications and restrictions imposed by other sections of the Act, such as Section 8(b)(4). Thus it is quite usual for an employer to contend that particular striking or picketing is prohibited by Section 8(b)(4), while the union asserts that it is "concerted activity," the right to engage in which is protected by Section 7. As this Court said in *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468, 478-79:

> "If this conduct does not fall within the prohibitions of §8 of the Taft-Hartley Act, it may fall within the protection of §7, as concerted activity for the purpose of mutual aid or protection."

A doctrine that the States may handle cases which are within the jurisdiction of the federal Board but which that Board declines to handle, except that the States may not prohibit conduct protected by the federal Act, would mean that in each case the state court or board would have to

interpret the general, complicated, and interrelated provisions of the federal Act, and reach a determination whether that Act sanctioned the activity in question. Conflicting and inconsistent holdings would be certain to result. As this Court said in *Garner* v. *Teamsters Union*, 346 U.S. 485, 491:

> "A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law."

Each state court determination would present a federal question which this Court could be asked to review. In every case in which a state statute was involved and a claim to the protection of the federal Act was rejected, an appeal to this Court would lie under Title 28, Sec. 1257(2). In innumerable other cases conflicts among the state courts, and between state courts and the federal Board and the federal reviewing courts, would furnish grounds for petitions for certiorari. Either conflicting and inconsistent decisions to the point of chaos would ensue, or a heavy burden would be placed on this Court.[1]

Finally, the state courts or boards, and this Court on any review, would have to decide these issues in the absence of any decision by the National Labor Relations Board. In both the *Garner* and *Anheuser-Busch* cases this Court expressed reluctance to interpret the National Labor Relations Act save after an initial decision by the federal Board.

In sum, if the Court holds that the state courts and boards may handle cases within the federal Act but which the federal Board declines to process, we think it must and should hold that substantive federal rights conferred by the federal

[1] If the Court rules that the state courts and boards may take jurisdiction of cases which the federal Board declines to handle, questions will arise whether the federal district courts may also entertain these cases on original jurisdiction and on removal.

Act must nontheless be respected by the state agencies; and the serious practical difficulties to which that would in turn lead should weigh against a decision in favor of state jurisdiction.

II

State Jurisdiction Over Classes of Cases

We come now to consider the practical feasibility of permitting the States to assume jurisdiction over classes or categories of cases which the federal Board has announced it will not handle; without requiring that initial application be made in each individual case to the federal Board. This question is suggested but not answered by the opinion of this Court in *Building Trades Council* v. *Kinard Construction Company*, 346 U.S. 933, 74 S. Ct. 373. In reversing per curiam the Court said:

> "Since there has been no clear showing that respondent has applied to the National Labor Relations Board for appropriate relief, *or that it would be futile to do so*, the Court does not pass upon the question suggested by the opinion below of whether the State court could grant its own relief should the Board decline to exercise its jurisdiction." [Italics added]

This question of permitting the States to proceed without initial resort to the federal Board arises, of course, only if the Court concludes that the States may, under some procedure, assert jurisdiction in these cases which are without the statutory jurisdiction of the federal Board but which that Board will not handle. If the decision is completely adverse to state jurisdiction, no question as to the procedure to be followed arises.

One of the justifications which has been put forward for the federal Board's adoption of general standards to govern its assertion of jurisdiction, as distinguished from proceed-

ing on a case-by-case basis, is that general standards enable the persons concerned to know in advance whether the federal Board will handle their cases. See the opinion of Member Peterson in *Breeding Transfer Company,* 110 NLRB 493, 527. If the jurisdictional standards in fact achieved this objective, so that it were possible to know in advance with fair certainty whether the Board will handle particular cases, it might be practicable (other issues apart) for the States to assume jurisdiction without requiring initial application to and turn down by the federal Board.

However, for the most part, no such degree of predictability has been achieved. On the contrary, the Board's standards for determining whether to assume jurisdiction are so complicated, and their application so uncertain, that in a large percentage of situations the parties cannot know in advance whether or not the federal Board will take jurisdiction.

A cursory examination of these jurisdictional standards will show why this is so. The Board's Nineteenth Annual Report (1954) lists, pp. 2-5, fourteen separate standards for determining whether to assert jurisdiction. Several of these standards have numerous subdivisions.

The most important of the fourteen standards is the first, which reads:

> "We have determined that in future cases the Board will assert jurisdiction—
>
> "1. [General Standards for Other-Than-Retail Establishments:] over enterprises which annually meet one or more of the following standards:
>
> (1) *Direct inflow standard:*
>
> An enterprise which receives goods or materials from out of State, valued at $500,000 or more.
>
> (2) *Direct outflow standard:*
>
> An enterprise which produces or handles goods and ships such goods out of State, or performs serv-

ices outside the State in which the enterprise is located, valued at $50,000 or more.

The enterprise itself must actually ship the goods to the out-of-State destination.

(3) *Indirect inflow standard:*

An enterprise which receives goods or materials from other enterprises in the same State which those other enterprises received from out of State, valued at $1,000,000 or more.

However, the goods must be received by the ultimate purchaser in the form in which they entered the State.

(4) *Indirect outflow standard:*

An enterprise which furnishes goods or services to other enterprises coming within subparagraph (2), above or to public utilities or transit systems, or instrumentalities or channels of commerce and their essential links, which meet the jurisdictional standards established for such enterprises; *and*

(a) Such goods or services are directly utilized in the products, services, or processes of such enterprises and are valued at $100,000 or more; *or*

(b) Such goods or services, regardless of their use, are valued at $200,000 or more.

(5) *Multistate standard:*

An establishment other than retail which is operated as an integral part of a multistate enterprise, *and*

(a) The particular establishment involved meets any of the foregoing standards; *or*

(b) The direct outflow of the entire enterprise amounts to $250,000 or more; *or*

(c) The indirect outflow of the entire enterprise amounts to $1,000,000 or more.

We have further determined that unless an employer's volume of operations meets one of the Board's new independent jurisdictional standards, we will not accumulate those standards in order to assert jurisdiction.

However, direct and indirect inflow may be added in applying the indirect inflow standard."

The captions of the other standards are:

"2. [Intrastate Links of Interstate Commerce:]
"3. [Concerns Doing National Defense Business:]
"4. [Retailing Concerns:]
"5. [Multistate Retail Chains:]
"6. [Franchised Dealers:]
"7. [Office Buildings:]
"8. [Utilities and Transit Systems:]
"9. [Newspapers:]
"10. [Taxicabs:]
"11. [Associations of Employers:]
"12. [Communications Concerns:]
"13. [Restaurants:]
"14. [Business in the Territories:]"

In addition, the Board has various other rules which it employs in determining whether to assert jurisdiction, and which it might have embodied in its "standards" but did not. For example, the Board will not take jurisdiction over hotels (*Hotel Members of Miami Beach Hotel Association*, 36 LRRM 1447 (1955)), or unions as employers (*Oregon Teamsters Security Plan Office*, 113 NLRB 987, aff'd 38 LRRM 2269 (CA DC, 1956)), or over non-profit organizations generally, with the exception of their purely commercial activities (*Lutheran Church, Missouri Synod*, 109 NLRB 859; *Armour Research Foundation of Illinois Institute of Technology*, 107 NLRB 1052; *California Institute of Technology*, 102 NLRB 1402; *Philadelphia Orchestra Association*, 97 NLRB 548; *The Trustees of Columbia University in the City of New York*, 97 NLRB 424). Again, the Board has a rule that in determining whether to take jurisdiction when secondary boycott charges are filed against a union, it will take into account the operations of all the affected employers (*International Brotherhood of Teamsters, etc., and McAllister Transfer, Inc.*, 110 NLRB 1769 (1954); *Local*

Union No. 830, Brewery and Beer Distributors Drivers, Helpers, and Platform Men, etc. (*Earl Vann*), 106 NLRB 405 (1953); *Truck Drivers Local Union No. 649, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL* (*Jamestown Builders Exchange, Inc.*), 93 NLRB 386 (1951)). It is manifest, in view of the multiplicity and complexity of these jurisdictional standards and rules, that in a great many situations employers and unions must be quite uncertain as to whether the federal Board will or will not handle their cases; and it is not surprising that the Board's jurisdictional standards have themselves become a principal subject of controversy within the Board. See e.g. *Deskins Super Market, Inc.*, 115 NLRB No. 252; *Gary Hobart Water Corp.*, 115 NLRB No. 253.

Unions and employees encounter particular difficulty in anticipating how the Board will decide jurisdictional issues, because often they do not have available to them the data which may be controlling under the "standards." A union, for example, normally cannot know whether during the preceding year a particular enterprise had an indirect inflow of goods from out of the State valued at a million dollars or more. Thus, even when it is clear which of the various jurisdictional standards applies, so that the employer may be able to determine in advance whether the Board will take jurisdiction, the union usually cannot do so.

There are indeed only two sorts of situations in which the Board's actions on jurisdiction are reasonably predictable. The first is when the employer's business is so very small that it is apparent that its operations do not meet *any* of the various dollar volume minima embodied in the standards.

The second such situation is when the Board has a fixed policy of refusing to process cases involving employers of a particular type or engaged in a particular business. The

interested parties normally have no difficulty in ascertaining whether a particular employer is a hotel or a union or a taxicab company. Here any uncertainty as to whether the Board will assert jurisdiction comes principally from the possibility that the Board may change its position. However, that likelihood may be substantial. For example, although the Board has throughout its existence refused to handle cases involving hotels, in the Miami Beach hotel dispute two of the five Board members declared that the Board should take a fresh look at this rule. (*Hotel Members of Miami Beach Hotel Association*, 36 LRRM 1447 (1955).

Again, the Board by a 3-2 vote recently refused to take jurisdiction over a union acting as an employer. *Oregon Teamsters' Security Plan Office*, 113 NLRB 987, aff'd 38 LRRM 2269 (CA DC, 1956). In the only earlier decision on this point, however, the Board did take jurisdiction over a union as an employer. *Air Line Pilots Association*, 97 NLRB 929. Since the *Oregon Teamsters'* decision was by a 3-2 vote, the general jurisdictional principle it purportedly laid down may not be immutable. Thus, even though it may be quite apparent whether an employer is a union, there is no resulting certainty as to whether or not the Board will take jurisdiction.

Again, in its 1954 jurisdictional standards the Board states that "we shall refuse to assert jurisdiction over taxicab companies." Nineteenth Annual Report, p. 5. Earlier under the 1950 standards, the Board exercised jurisdiction over taxicab companies meeting certain specifications, while before that it refused to handle taxicab companies at all. See *Checker Cab Company*, 110 NLRB 683.

Further, the 1954 jurisdictional standards in general were adopted by a 3-2 vote. If we take at face value the assertions of the Board majority that considerations of caseload and budget played a major role in the formulation of these standards (*Breeding Transfer Company*, 110 NLRB 493,

497), we must anticipate that these standards will be revised from time to time in the light of changing caseloads and appropriations. If, on the other hand, we accept the view of the dissenting members that the 1954 jurisdictional standards had their origin in the majority's "states' rights" philosophy, and were in fact politically motivated (*Breeding Transfer Company*, 110 NLRB 493, 500-505, 528); then we can expect that the standards will be revised when and if the Board acquires a different political complexion.

In deciding adversely to state jurisdiction the issue now before the Court, the Court of Appeals for the Tenth Circuit stated:

> "Unless and until there is an express ceding of jurisdiction to a proper state agency exclusive jurisdiction remains in the federal agency. For sake of order such must be true. Otherwise, *an interminable problem of determining jurisdiction would exist*, throwing needless confusion into an area clearly pre-empted by Congress." (*Retail Clerks Local No. 1564* v. *Your Food Stores*, 225 F. 2d 659, 663). [Italics added]

The same point was even more eloquently stated in *Universal Car Co.* v. *Association of Machinists*, 35 LRRM 2087, 2098 (Cir. Ct., Mich. 1954):

> "If the jurisdiction of the state courts is to depend—not upon the act of Congress and the actual jurisdiction of the NLRB—but upon the day-to-day or month-to-month discretionary exercise of jurisdiction by the Board, dependent upon changing budgetary conditions or upon its economic, social or political views at the moment, then neither the courts nor the litigants can know with any certainty where jurisdiction lies, nor whether in a given case jurisdiction existing at the time of its commencement will continue until its final decision."

The same problems which we noted earlier (*supra*, pp. 4-5) would arise if the state courts had to determine the sub-

stantive content of the federal Act, would also arise if the state courts had to decide, in advance of actual application to the federal Board, whether that Board would take jurisdiction.

Each state board or court would have to take evidence on the nature of the employer's business, its direct and indirect interstate inflow and outflow, etc., etc., and examine and interpret the federal Board's standards and the other rules and policies it employs in determining whether to assert jurisdiction. Either chaos would result or a heavy burden would be thrown on this Court of resolving the inevitable conflicts and inconsistencies. Further, in determining whether to process a particular case the federal Board is not applying a rule of law but exercising an asserted discretion. Even where an issue of law, i.e., the interpretation of the federal Act, is involved, this Court has expressed its reluctance to rule save after initial decision by the federal Board. See *supra*, p. 5. The considerations against having the state courts, and this Court on review, undertake to guess how the federal Board would exercise its discretion are even stronger.[2]

For all of these reasons, we conclude that a doctrine permitting recourse to the state courts or boards in cases within the statutory jurisdiction of the federal Board, without prior application to the latter Board, would be unworkable.

III

State Assumption of Jurisdiction After Application to Federal Board

We come now to consider the workability of a rule that

[2] It is unavoidable that the state courts, and this Court on review, must sometimes decide whether a case is within the *statutory* jurisdiction of the federal Board in the absence of an initial ruling by that Board. But that is an issue of law, rather than of discretion, and its resolution has not up until now provided any particular difficulty.

the States may assume jurisdiction over a case within the statutory jurisdiction of the federal Board only if application is first made to that Board and it refuses to exercise jurisdiction.

Two difficulties with such a procedure are set forth in the Minority Report of the Senate Committee on Labor and Public Welfare on the Smith bill (S. 2650) in 1954. As discussed at greater length, *infra*, pp. 20-22, at that time the Administration proposed to eliminate the "no-man's land" by amending the National Labor Relations Act to authorize the States to assume jurisdiction "over labor disputes over which the Board declines * * * to assert jurisdiction." The Minority Report has this to say of this proposal (Rept. 1211, 83rd Cong., 2nd Sess., Part 2, pp. 14-15):

> "We agree with the committee majority that a problem now exists with regard to the commerce jurisdiction of the Federal Board on the one hand and State agencies and courts on the other. That problem comes about because the Federal Board now has, and now exercises, discretion to decline to take cases within its jurisdiction—the power which the majority proposal would explicitly confer on the Board. When the Federal Board refuses to take a case within its jurisdiction, the State agencies or courts are nevertheless without power to take jurisdiction, since the dispute is covered by the Federal act, even though the Federal Board declines to apply the act. There is thus a hiatus—a no man's land—in which the Federal Board declines to exercise its jurisdiction and the State agencies and courts have no jurisdiction. This no man's land has been greatly enlarged in recent months by the Federal Board's increased refusal to take all sorts of cases within its jurisdiction; but some problem would exist in any event, as the Act is written.
>
> "The question, then, is how best to correct this situation. The majority would correct it by permitting the Federal Board to continue on a case-by-case basis to decide whether or not to accept jurisdiction, and would

authorize the States' agencies or courts to act in any case after the Federal Board declined to act.[3]

"It seems to us that this proposal is not satisfactory and that a better solution can be found.

"The procedure proposed is not satisfactory for at least 2 reasons:

"(1) The parties should know in advance whether their dispute is going to be decided under Federal law or State law. In no single case does a State labor relations law contain the same provisions as Taft-Hartley. If the parties do not know in advance what law governs their dispute, they cannot know how they must act in order to act lawfully.

"(2) Secondly, the procedure proposed by the majority would make for delay. Every case would have to be taken before the Federal Board first, for it to decide whether or not to take jurisdiction. That might take months or even years. Then, if the Federal Board declined to act, it would be necessary to start over before the State boards or courts.

"Let us illustrate how this would work. Suppose a union is contemplating striking a construction project. Wages and prices are rising, the existing contract is running out, and the construction project will not last much longer. Hence the union wants to strike immediately without giving the 60-day notice which is required by the Federal act but not by the State law.

"Let us suppose the union goes ahead and strikes

---

[3] The Minority Report interprets the Majority proposal as requiring initial application to the federal Board in each case. The actual language of the Administration bill, quoted above, invited that interpretation. The Majority Report, however, states (Senate Rept. No. 1211, 83rd Cong., 2nd Sess., p. 19): "Thus, for example, if the Board establishes a policy that it will not assert jurisdiction in any case where the employer's dollar volume of business in interstate commerce falls below a stated figure, the States and Territories are authorized to deal with any case falling within the class excluded by the Board without waiting for the Board to decline to assert jurisdiction in the particular case coming before the State or Territorial court or agency."

when the contract runs out, without giving the 60-day notice.

"The employer can then file a charge with the NLRB. The Board will decide whether or not, in its discretion, to take the case. If it takes the case, the union will be adjudged to have been guilty of an unfair labor practice and its members will have forfeited their rights as employees under the act.

"If, on the other hand, the Federal Board declines to take the case, the employer may resort to a State board or court. However, the union will not have violated any State law, so this resort will be without avail."

That the difficulties thus foreseen by the Senate Labor Committee minority are not fanciful is demonstrated by *Fienberg Furniture Co.* v. *DiFede*, 38 LRRM 2493 (NY S. Ct. 1956). In May 1954, the union filed unfair labor practice charges with the New York State Labor Relations Board. The employer urged that its business affected interstate commerce, and that the National Board had exclusive jurisdiction; and, after considering the information on commerce submitted by the employer, the State Board dismissed, but without prejudice to refiling with it if the national Board declined to assert jurisdiction. (The New York Board follows the policy of processing cases which the federal Board has refused to handle.)

In June 1954, the union filed its charges with the national Board. The Regional Director dismissed the charge, employing a Board form letter which asserts that the case "has been carefully investigated and considered" and that "it does not appear that further proceedings are warranted inasmuch as the charge lacks merit."[4]

In the meantime, the national Board also had under consideration a petition for decertification of the union. In

[4] A similar form letter is set out in Silverberg, "How To Take A Case Before the National Labor Relations Board" (1949), p. 145.

December 1954, after several hearings at which evidence on interstate commerce was taken, the Regional Director dismissed the decertification petition. The form letter which he employed this time recites that further proceedings are not warranted "inasmuch as it would not effectuate the policies of the Act to assert jurisdiction."

In February 1955, the union refiled its unfair labor practice charges with the State Board. The employer urged that the national Board had dismissed the charges on the merits. The next six months were taken up with a series of unsuccessful efforts by the union to induce the national Board to clarify the grounds of its actions.

In December 1955, the State Board issued a complaint. The employer thereupon secured from the state supreme court a temporary injunction restraining the New York Board from proceeding pending a determination by the court of whether that Board had jurisdiction.

No further developments are thus far reported. Perhaps the union, after two years of vain effort to induce some labor board to hear its charges, has become discouraged.

As this case indicates, a doctrine authorizing the States to proceed after initial resort to and turn down by the federal Board not only insures considerable delay but encounters the difficulty that under present National Labor Relations Board practice it is often impossible to say why that Board has declined to proceed. It seems unnecessary to elaborate upon this latter point, however, since presumably the federal Board could easily clarify its procedures if this Court establishes a rule that state jurisdiction over cases within the statutory jurisdiction of the federal Board depends upon a showing that the federal Board has refused to exercise its jurisdiction.

However, even when the ground for the federal Board's dismissal of a case clearly appears, a problem will often remain of whether the Board's action was such a refusal to

exercise jurisdiction as to entitle the States to go ahead. For example, Section 10(b) of the federal Act provides:

> "That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge * * *."

If the charges filed with the federal Board are dismissed under this provision, are the States then to be free to act? Are they to be free to act in all cases dismissed under this provision, or only in cases where the federal Board under its jurisdictional standards would presumably have refused to act anyway? If the latter rule be adopted then the States will be faced with the difficulty discussed earlier of having to interpret the Board's jurisdictional standards, policies, etc.

Again, many unfair labor practice cases and representation proceedings are dismissed because the union is not in compliance with Section 9(f), (g) or (h) of the federal Act. Are the States to be free to process these cases?

Again, the Board, or its General Counsel, sometimes refuses to proceed on the ground that the violation has been discontinued, or was not serious. See, for example, administrative decisions of the General Counsel, Nos. K-637 and K-638, announced on September 13, 1956. Are discretionary refusals to proceed of this sort to be regarded as freeing the States to act in these cases?

In sum, there are a number of practical difficulties about permitting the States to take jurisdiction after the federal Board refused to act. It does seem to us, however, that such a rule would be more workable, or less unworkable, than permitting the States to decide initially whether the federal Board would take jurisdiction if application to it were made.

IV

No State Jurisdiction

Let us consider, finally, what effects would result from a decision by this Court that the States may not assume any part of the statutory jurisdiction of the national Board, except pursuant to a cession agreement entered into under Section 10(a) of the federal Act.

The immediate consequence of such a holding would, obviously, be a "no-man's land" in which labor relations would be unregulated. Indeed that consequence has already resulted in those States whose courts or administrative agencies have ruled against state jurisdiction.

We are not able on the basis of the information available to us to measure the extent of this incipient "no-man's land". It would encompass, as suggested in the opinions in *Breeding Transfer Company*, 110 NLRB 493, not only the area evacuated by the Board in 1954 in adopting its latest and most stringent jurisdictional standards, but also the areas earlier abandoned by it, either in its 1950 standards or before that in decisions on a case-by-case basis not to assert jurisdiction. The Board majority in *Breeding Transfer* "judges" that the Board's cumulative declinations "will affect no more than 1 percent of the employees subject to the broadest reach of the Board's legal jurisdiction". 110 NLRB at 500. If this estimate be correct, the "no-man's land" which would result from a decision here adverse to state jurisdiction would not be extensive. However, in his dissenting opinion in *Breeding Transfer* Member Murdock states (110 NLRB at 508):

> "it seems probable that at least 25 percent and perhaps as much as 33⅓ percent of our past jurisdiction is now eliminated."

We do not have the data needed to judge where the truth

lies between the conflicting estimates of the Board members as to size of the area evacuated by the federal Board. But, whatever may be the breadth of the potential "no-man's land", it obviously would be undesirable to have *any* area in which labor relations are wholly unregulated.

However, a determination by this Court that the States may not exercise the vacated jurisdiction need not create "no-man's land" of any long duration. The federal Board could and should temporarily fill the vacuum by undertaking to exercise its full statutory jurisdiction pending resolution of the issue by Congress. And there are a variety of methods of permanently eliminating any "no-man's land", among which Congress could choose.

One obvious solution would be for Congress to require the Board to exercise to the full its present statutory jurisdiction. We think that a great deal could be said in favor of this particular solution; but that of course is a matter for the Congress rather than the Court.

Two other possible solutions of the "hiatus" problem were put forward in the Senate Labor and Public Welfare Committee in 1954, when Taft-Hartley revision was last under consideration in the Congress. All members of the Senate Labor Committee, it may be noted, agreed that the "no-man's land" existed, viz., that the States could not assume jurisdiction over cases which the federal Board in its discretion declined to handle. The Administration proposal for filling this vacuum, put forward by the Republican majority of the Committee, was that the States be authorized to assume this jurisdiction. The Committee Report stated (Senate Report No. 1211, 83rd Cong., 2nd Sess., pp. 17-18):

> "During all of its long history, the Board has consistently held that it has the discretionary power to refuse to assert its jurisdiction in particular cases or

classes of cases where it has jurisdiction, if the impact on interstate commerce is remote or insubstantial.

* * * * * *

"The effect, however, of the Board's policy of refusing to assert its jurisdiction has been to create a legal vacuum or no-man's land with respect to cases over which the Board, in its discretion, has refused to assert jurisdiction. In these cases the situation seems to be that the Board will not assert jurisdiction, the States are forbidden to do so, and the injured parties are deprived of any forum in which to seek relief. In order to eliminate this legal no-man's land while affirming the Board's power to refuse to assert jurisdiction, the committee approved an amendment permitting the agencies or courts of any State or Territory to assume and assert jurisdiction in any labor dispute or class of cases over which the Board has declined to assert its own jurisdiction."

The Committee majority proposed, in other words, to *amend* the National Labor Relations Act to resolve in favor of state jurisdiction the very issue now before this Court. (S. 2650, 83rd Cong., 2nd Sess.)

As already noted, the Democratic minority of the Committee agreed that a "no man's land" existed, and that the Congress should take corrective action, but they viewed the solution proposed by the majority as unworkable. See *supra*, pp. 14-16. They urged instead:

"* * * that the jurisdiction of the federal Board be explicitly defined, that it be required to take all cases within that jurisdiction, and that all other cases be left to the jurisdiction of the State agencies and courts."[5]

Both the majority and the minority proposals failed of en-

[5] See Senate Report No. 1211; 83rd Cong., 2nd Sess., part 2, pp. 14-15.

actment when the Senate recommitted the bill to committee.[6]

Yet a fourth solution, which was proposed by Senator Ives in 1953, would be for Congress to amend Section 10(a) of the National Labor Relations Act to authorize the Board to enter into cession argreements with state agencies without regard to the restrictions now found in that section. S. 1264, 83rd Cong., 1st Sess. This solution would have the advantage that in determining whether to enter into a cession agreement the federal Board could take into account whether the particular State does or does not have a comprehensive labor relations code of its own.

That brings up the point that a very broad "no-man's land" now exists in state labor law, which is in no way attributable to the issue now before this Court. Examination of state labor laws reveals that only 12 States have labor relations codes roughly comparable in comprehensiveness to Sections 7 and 8 of the National Labor Relations Act while 12—not in all instances the same ones—make provision for the resolution of representation issues.[7]

What this means in actual practice is illustrated by the current dispute between the Hotel and Restaurant Employees' and Bartenders' International Union and the Miami Beach hotels. In 1955 the Union petitioned the National Labor Relations Board for an election among the employees of all members of the Miami Beach Hotel Association. By a vote of 3-2 the Board dismissed the case, in line with its long established Board policy of refusing to assert

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[6] Two months later the Board announced its new, more stringent, standards for exercising its jurisdiction.

[7] The following States both have labor relations codes and election machinery: Colorado, Connecticut, Kansas, Massachusetts, Minnesota, New York, Oregon, Pennsylvania, Rhode Island, Utah, Wisconsin. Michigan has a labor relations code but no election machinery, while the situation is reversed in North Dakota.

jurisdiction over hotels. *Hotel Members of Miami Beach Hotel Association*, 36 LRRM 1447. Various hotels then secured injunctions in the Florida state courts against union picketing. In these state court proceedings the question whether the union represents a majority of the employees has been in issue, but no state machinery exists for resolving the question. At one stage a chancellor did appoint a commissioner to conduct an election by secret ballot to determine whether the union represented a majority of the employees, but the Florida Supreme Court reversed, declaring that the chancellor's action "has no precedent." *Thomas Jefferson, Inc.*, v. *Hotel Employees*, 84 So. 2d 583, 37 LRRM 2338 (Fla. 1956). This "no-man's land" does not stem from any concern by the Florida Supreme Court over federal occupation of the field: the state court did not so much as advert to that issue.

Thus, the "no-man's land" which would be created by a decision by this Court in this case adverse to state jurisdiction could, and in all probability would, be promptly eliminated by the federal Board or by Congress. On the other hand, a decision in favor of state jurisdiction would actually leave many labor disputes in a partial or total "no-man's land".

CONCLUSION

In this brief *amicus* we have primarily considered the comparative feasibility of various dispositions the Court might make of the issue before it in this case.

None of the alternatives available to the Court is wholly satisfactory. On balance, however, it seems to us that a decision that the States may not assume any part of the statutory jurisdiction of the federal Board, except pursuant to a cession agreement under Section 10(a), would from a practical standpoint be the least harmful of the possible decisions. Further, any other decision would require consid-

erable torturing of the National Labor Relations Act.

A ruling that the States may not assume any part of the renounced jurisdiction would in effect leave the problem in the hands of Congress and the federal Board. We think it would be appropriate and desirable for the Court to do just that.

The issue before the Court is essentially political in its origin. It exists because: (1) in 1947, when Congress authorized the federal Board to enter into cession agreements with the state agencies, it included a proviso that the state law must be consistent with the Taft-Hartley Act; (2) no State has, quite rightly in our view, seen fit to parallel Taft-Hartley in its own labor relations law;[8] (3) Congress in 1954 rejected the Administration's proposal to authorize the States to assume jurisdiction over cases within the jurisdiction of the federal Board which that Board declines to handle; and (4) notwithstanding this action by the Congress, the federal Board proceeded with its plans to curtail substantially its exercise of jurisdiction.[9] We do not think that the Court can adequately solve the practical and political problem created by this failure of synchronization among the Congress, the States, and the federal Board; or that it should undertake to do so.

As we have shown, none of the alternative possible decisions which this Court may render are wholly, or even reasonably, satisfactory from a practical standpoint. The Court has only the power to interpret the statute Congress wrote; not the power to revise and amend it to make it

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[8] Alabama did enact a little Taft-Hartley Act for Wilcox County, Alabama; but the state Attorney General ruled it invalid under the state constitution. 26 LRRM 79.

[9] The issue now before the Court could theoretically have arisen prior to the Board's 1954 adoption of more stringent standards for asserting jurisdiction, but it never did; nor would it have possessed the practical importance that now attaches to it.

Local v. *Wisconsin Employment Relations Board*, 315 U.S. 740, 748-750; *UAW* v. *Wisconsin Employment Relations Board*, 351 U.S. 266, 273, note 11; *United Construction Workers* v. *Laburnum Construction Corp.*, 347 U.S. 656, 663, note 5.

This Court has recognized that the National Labor Relations Act does not occupy the field of labor relations to the complete exclusion of the states, but that there are areas where states may still act. *Garner* v. *Teamsters Union*, 346 U.S. 485, 488, note 4; *United Construction Workers* v. *Laburnum Construction Corp.*, 347 U.S. 656; *UAW* v. *Wisconsin Employment Relations Board*, 351 U.S. 266. We shall demonstrate below that the instant case is an example of one such area where the states may act and that Congress has not pre-empted that area.

A. Congress, Although Aware of the Board's Jurisdictional Standards, Has Taken No Action to Disapprove Them, But on the Contrary Has Given at Least Implicit Approval to Such Standards. Accordingly, It Follows That Congress Has Not Pre-empted the Areas That Do Not Fall Within Such Standards.

In *Bethlehem Steel Co.* v. *N. Y. State Labor Relations Board*, 330 U.S. 767, 774, this Court said:

> "* * * However, when federal administrative regulation has been slight under a statute which potentially allows minute and multitudinous regulation of its subject, cf. Atlantic Coast Line R. Co. v. Georgia, 234 U.S. 280, 58 L. Ed. 1312, 34 S. Ct. 829, or even where extensive regulations have been made, if the measure in question relates to what may be considered a separable or distinct segment of the matter covered by the federal statute and the federal agency has not acted on that segment, the case will be treated in a manner similar to cases in which the effectiveness of federal supervision awaits federal administrative regulation. Northwestern Bell Teleph.

workable. On the other hand, a number of alternatives are available to the Congress and the Board. See *supra*, pp. 20-22. In this situation, we respectfully suggest that the Court leave it to those bodies to solve the problem they created; and that the Court simply rule, in line with the plain meaning of the Act, that, absent a cession agreement complying with Section 10(a), the States may not assume any part of the statutory jurisdiction of the federal Board.

Respectfully submitted,

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Co. v. Nebraska State R. Commission, 297 U.S. 471, 80 L. Ed. 810, 56 S. Ct. 536, supra; H. P. Welch Co. v. New Hampshire, 306 U.S. 79, 83 L. Ed. 500, 59 S. Ct. 438, supra. The states are in those cases permitted to use their police power in the interval. Terminal R. Assoc. v. Brotherhood of R. Trainmen, 318 U.S., 87 L. Ed. 571, 63 S. Ct. 420."

We submit that this fits precisely the situation presented here and that therefore state court action is permissible.

Congress, as the Courts have recognized and as Petitioners concede, has long been aware of the Board's practice to decline to assert jurisdiction in many cases that have only a small impact upon commerce so that, in view of its limited budget and personnel, the Board might devote itself to handling cases having a pronounced impact upon the flow of interstate commerce. Petitioners' Br., pp. 30-31; *Haleston Drug Stores* v. *NLRB*, 187 F.(2d) 418, 421 (C.C.A. 9), *cert. den.*, 342 U.S. 815; *Optical Workers Union* v. *NLRB*, 227 F.(2d) 687, 691 (C.C.A. 5), *reh'g. den.* 229 F.(2d) 170, *cert. den.* 351 U.S. 963; *Hearings before Joint Committee on Labor Management Relations*, 80th Cong., 2nd Sess., pp. 1121, 1155-1156, 1157-1165; *Report of Joint Committee on Labor Management Relations, S. Rept. 986*, 80th Cong., 2nd Sess., Part 3, pp. 11-13; *S. Rept. 99*, 81st Cong., 1st Sess., Part 1, p. 40; *H. Rept. 1852*, 81st Cong., 2nd Sess., p. 10; *NLRB 16th Annual Report (1952)*, pp. 15-39, 256-257. Far from disapproving the Board's practice in this regard, Congress has impliedly at least approved such practice. First, it has consistently refrained from making funds available to the Board which would permit it to handle cases not falling within its jurisdictional standards. *Hollow Tree Lumber Company*, 91 NLRB 635, 636, 26 LRRM 1543; *Breeding Transfer Co.*, 110 NLRB 493, 35 LRRM 1020. Second, affirmative indications of Congress' approval of the Board's jurisdictional standards may be found in *Hearings before Senate Committee on Labor and Public*

INDEX

	PAGE
Interest of Amici Curiae	1
Argument	3
Where the National Labor Relations Board Declines for Policy Reasons to Take Jurisdiction of a Particular Case, a State Court has Jurisdiction to Act in the Case	3
A. Congress, Although Aware of the Board's Jurisdictional Standards, has Taken no Action to Disapprove Them, But on the Contrary has Given at Least Implicit Approval to Such Standards. Accordingly, it Follows that Congress has not Pre-empted the Areas that do not Fall Within Such Standards	4
B. Permitting State Court Jurisdiction Here Raises no Possibility of Conflict With Federal Authority	6
C. The Authorities are Plain that the State Court had Jurisdiction to Proceed Here	7
D. Practical Considerations Also Require a Holding in Favor of State Court Jurisdiction	8
E. Petitioners' Contention Based Upon the Proviso to Section 10(a) of the Act is Untenable	9
Conclusion	12

CITATIONS

Cases:

Allen Bradley Local v. Wisconsin Employment Relations Board, 315 U.S. 740	3-4
Ashland Motor Co. (Wisconsin Employment Relations Board), 37 LRRM 1116	8

PAGE

Cases (continued):

Bethlehem Steel Co. v. N. Y. State Labor Relations Board, 330 U.S. 767 ..... 3, 4, 6, 8, 10
Breeding Transfer Co., 110 NLRB 493, 35 LRRM 1020 ..... 5, 9
Building Trades Council of Reno v. Bonito (Nev.), 280 P.(2d) 295, 35 LRRM 2600 7
Cain, Brogden & Cain v. Teamsters (Tex.), 285 S.W.(2d) 942, 37 LRRM 2298 7
Garmon v. San Diego Bldg. Trades Council (Calif.), 291 P.(2d) 1, 37 LRRM 2233 7
Garner v. Teamsters Union, 346 U. S. 485 ..... 4, 6
Guss v. Utah Board (Utah), 296 P.(2d) 733, 38 LRRM 2137 ..... 7, 8
Haleston Drug Stores v. NLRB, 187 F.(2d) 418, *cert. den.* 342 U. S. 815 5
Hilton Hotels (Puerto Rico Labor Relations Board), 37 LRRM 1474 8
Hollow Tree Lumber Company, 91 NLRB 635, 26 LRRM 1543 5
Ideal Soap & Chemical Co. (Pa. Labor Relations Board), 38 LRRM 1043 8
Interstate Overall Service, Inc. (Mass. Labor Relations Comm.), 37 LRRM 1431 8
NLRB v. Denver Bldg. & Const. Trades Council, 341 U. S. 675 ..... 6, 9
Optical Workers Union v. NLRB, 227 F.(2d) 687, *reh'g. den.* 229 F.(2d) 170, *cert. den.* 351 U. S. 963 5
Raisch Motors (N.Y. State Labor Relations Board), 35 LRRM 1631 8
Spielberg Mfg. Co., 112 NLRB 1080, 36 LRRM 1152 9
UAW v. Wisconsin Employment Relations Board, 351 U. S. 266 4
UE v. Worthington Corp., 38 LRRM 2507 (C.C.A. 1) 9
United Construction Workers v. Laburnum Construction Corp., 347 U. S. 656 ..... 4, 6, 9

PAGE

Cases (continued):

Walker Motors (Mich. State Labor Mediation Board), 36 LRRM 1290 8
Wong Yang Sung v. McGrath, 339 U. S. 33 11

Statutes:

National Labor Relations Act (61 Stat. 136, 29 U.S.C. Supp. V, 151 et seq.) 2

Miscellaneous:

Hearings before Joint Committee on Labor Management Relations, 80th Cong., 2nd Sess., pp. 1121, 1155-1156, 1157-1165 5
Hearings before Senate Committee on Labor & Public Welfare on S. 249, 81st Cong., 1st Sess., pp. 175-176, 177 5-6
H. Rept. 1852, 81st Cong., 2nd Sess., p. 10 ..... 5, 6
NLRB 16th Annual Report (1952), pp. 15-39, 256-257 5
Report of Joint Committee on Labor Management Relations, S. Rept. 986, 80th Cong., 2nd Sess., Part 3:
pp. 11-13 5
pp. 14-15 6
S. Rept. 99, 81st Cong., 1st Sess., Part 1, p. 40 5
S. Rept. 105, 80th Cong., 1st Sess., Part 1, p. 6 and Part 2, p. 38 10
93 Cong. Rec. 6540 10

IN THE

Supreme Court of the United States

October Term, 1956

No. 41

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, LOCAL NO. 427, AFL, *et al.*,
Petitioners,

v.

FAIRLAWN MEATS, INC.,
Respondent.

On Writ of Certiorari to the Supreme Court of Ohio

BRIEF FOR AMERICAN RETAIL FEDERATION, THE OHIO STATE COUNCIL OF RETAIL MERCHANTS, AND OHIO CHAMBER OF COMMERCE, AS AMICI CURIAE

Pursuant to written consent of the parties, which has been filed with the Clerk of this Court pursuant to Rule 42(2), American Retail Federation, The Ohio State Council of Retail Merchants, and Ohio Chamber of Commerce respectfully submit this brief as *amici curiae* in support of Respondent herein.

INTEREST OF AMICI CURIAE

The American Retail Federation is an association consisting of 30 national retail associations and 37 statewide retail groups, comprising a membership in excess of 700,000 retail stores and employing an estimated

7,500,000 persons. The Ohio State Council of Retail Merchants is a trade association of retailers in Ohio, organized to keep its membership advised concerning developments in the retail industry including those in the field of labor-management relations. The Council has a membership of approximately 2,500 retail stores located all over the state of Ohio and employing an estimated 200,000 persons. Such State Council is one of the state-wide retail groups in the American Retail Federation. Ohio Chamber of Commerce is an association representing all classes, both large and small, of business, industry, agriculture and the professions in the state of Ohio. It has a membership of over 6,000, who employ in excess of 1,300,000 persons.

Most of the members of the American Retail Federation and of The Ohio State Council of Retail Merchants are small retailers. Their operations nevertheless may be considered by the courts to affect commerce and therefore be subject to the jurisdiction of the National Labor Relations Act. 61 Stat. 136, 29 U.S.C. Supp. V, 151 *et seq.* Similarly, many of the members of the Ohio Chamber of Commerce are small businesses, which may likewise be subject to the jurisdiction of that Act. However, under the announced jurisdictional standards of the National Labor Relations Board (see Respondent's Brief, Appendix B), the Board would decline to take jurisdiction over any labor controversy involving such small retailers and other small businesses. In such circumstances, unless such small retailers and other small businesses can have recourse to the state courts to obtain relief against unlawful strikes and picketing, they will have to suffer damage without legal redress.

Retail stores above all other businesses are perhaps most vitally in need of a forum to which to apply for relief when faced with unlawful strikes and picketing. Picketing by a minority union of a store to compel the

employer to enter into a union-shop agreement, as in the instant case, is an unlawful activity. Such picketing causes the retail stores almost irreparable loss immediately, because the public, upon whose constant patronage the retail store depends, will stay out of a store being picketed regardless of the merits or legality of the picketing. Likewise the life-blood of the retail store is the constant delivery of new merchandise to it for sale. If a union engages in secondary boycott picketing of the store's suppliers or delivery companies, again as in the instant case, then notwithstanding the illegality of such secondary boycott picketing, the store is immediately damaged seriously. Retail stores thus must have a forum to which to apply for relief and are accordingly vitally interested in the Court's upholding the ruling below that the state court has jurisdiction to act where the National Board declines jurisdiction.[1] This brief will address itself simply to that issue.

ARGUMENT

WHERE THE NATIONAL LABOR RELATIONS BOARD DECLINES FOR POLICY REASONS TO TAKE JURISDICTION OF A PARTICULAR CASE, A STATE COURT HAS JURISDICTION TO ACT IN THE CASE.

It is basic that the subject of labor relations falls within the competence of states to regulate and control. *Bethlehem Steel Co.* v. *N. Y. State Labor Relations Board,* 330 U.S. 767, 772. While Congress may occupy the field to the exclusion of the states, its intention to achieve that result must be clearly shown. *Allen Bradley*

[1] As Respondent's Brief points out, the case here is one where the National Board would decline to exercise its jurisdiction and it would have been futile therefore for Respondent to seek any relief through it.

Welfare on S. 249, 81st Cong., 1st Sess., pp. 175-176. See in particular Senator Taft's approval of the Board's policy of not taking jurisdiction over small enterprises having but a minor effect upon interstate commerce. *Id.*, p. 177.[2] See also *H. Rept. 1852*, 81st Cong., 2nd Sess., p. 10, and *S. Rept. 986*, 80th Cong., 2nd Sess., Part 3, pp. 14-15.

The foregoing shows that the case at bar, in the language of the Court in the *Bethlehem Steel* case, quoted *supra*, p. 4, presents a situation of a "separable or distinct segment of the matter covered by the federal statute" and one where "the federal agency has not acted on that segment". Since Congress has approved that inaction by the federal agency, it would be inconsistent to hold that it has pre-empted such cases. Rather it is clear in the circumstances that Congress has not pre-empted those cases and that a state is free to apply its own law and policy.

B. Permitting State Court Jurisdiction Here Raises No Possibility of Conflict With Federal Authority.

This Court has clearly shown that the basis of the pre-emption doctrine in the labor field is the actual or potential conflict that could arise with NLRB adjudication if other tribunals were allowed jurisdiction. See *Garner* v. *Teamsters Union*, 346 U.S. 485, 490-491, 498-499; *United Construction Workers* v. *Laburnum Construction Corp.*, 347 U.S. 656, 663, note 5. In the latter case the Court said (347 U.S. at 665):

[2] This Court also has long been aware of the Board's policy of refraining "for budgetary or other reasons" to take jurisdiction in particular cases (*Bethlehem Steel Co.* v. *N. Y. State Labor Relations Board*, 330 U.S. 767, 776) and has approved such policy. *NLRB* v. *Denver Bldg. & Const. Trades Council*, 341 U.S. 675, 684.

> "To the extent that Congress prescribed preventive procedure against unfair labor practices, that case [Garner] recognized that the Act excluded conflicting state procedure to the same end . . . The care we took in the *Garner* case to demonstrate the existing conflict between state and federal administrative remedies in that case was, itself, a *recognition that if no conflict had existed*, the state procedure would have survived. . . ." (Emphasis Supplied)

There can of course be no conflict if the federal government, through its duly constituted agency, not only does not act in a particular case, but specifically announces that it will not take jurisdiction over the matter because such matter does not satisfy its jurisdictional standards. It would seem clear that in such a case where there is no conflict with federal authority and Congress has deliberately curtailed the federal agency's activities by approving its jurisdictional standards, a state court has jurisdiction to deal with such case.

C. The Authorities Are Plain That the State Court Had Jurisdiction to Proceed Here.

The highest courts of at least four states have flatly held that where the National Board declines jurisdiction for policy reasons as here, a state may act.[3] There are no decisions of the highest court of any state to the contrary. Moreover, seven state labor boards have considered the problem and without exception all have held that they may assert jurisdiction in cases where the National Board declines jurisdiction because its jurisdictional

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[3] *Cain, Brogden & Cain* v. *Teamsters* (Tex.), 285 S.W.(2d) 942, 37 LRRM 2298; *Garmon* v. *San Diego Bldg. Trades Council* (Calif.), 291 P.(2d) 1, 37 LRRM 2233; *Guss* v. *Utah Board* (Utah), 296 P.(2d) 733, 38 LRRM 2137; *Building Trades Council of Reno* v. *Bonito* (Nev.), 280 P.(2d) 295, 35 LRRM 2600.

standards are not met.[4] No state labor board has ruled to the contrary.

Since as this Court has recognized labor disputes have an immediate and direct impact upon the local community (*Bethlehem Steel Co.* v. *N. Y. State Labor Relations Board*, 330 U.S. 767, 772), these state courts and boards feel that for protection of the state and the welfare and health of its citizens, a state may act in a situation where the National Board declines to do so. Otherwise, there is a total absence of regulation to the plain detriment of the entire community. The state courts and boards also believe that they may act in these circumstances lest an injured party's property be destroyed unlawfully without his having any place to which to turn to obtain redress.

The lower federal court and lower state court decisions, upon which Petitioners rely (Pet. Br., p. 67, note 32), are distinguishable. Either they contain only contrary *dicta*, or they involve a situation where the National Board asserted jurisdiction or at least it was not clear, as it is here, that the National Board would not have asserted jurisdiction, or they are in conflict with other decisions of courts of like jurisdiction in the same state.

D. Practical Considerations Also Require a Holding in Favor of State Court Jurisdiction.

The National Board has a policy of refraining from intervening where a state court takes jurisdiction over matters with respect to which the Board as a matter of

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[4] *Guss* v. *Utah Board* (Utah), 296 P.(2d) 733, 38 LRRM 2137; *Raisch Motors*, 35 LRRM 1631 (N. Y. Board); *Ideal Soap & Chemical Co.*, 38 LRRM 1043 (Pa. Board); *Interstate Overall Service, Inc.*, 37 LRRM 1431 (Mass. Board); *Ashland Motor Co.*, 37 LRRM 1116 (Wisconsin Board); *Hilton Hotels*, 37 LRRM 1474 (Puerto Rican Board); *Walker Motors*, 36 LRRM 1290 (Mich. Board).

policy declines jurisdiction. See discussion of this subject in Respondent's Brief.

The Board likewise has a policy of declining to exercise its statutory jurisdiction in deference to an available arbitral remedy. *UE* v. *Worthington Corp.*, 38 LRRM 2507, 2510 (C.C.A. 1); *Spielberg Mfg. Co.*, 112 NLRB 1080, 36 LRRM 1152. These policies permit the Board to conserve its time and personnel for the "prompt handling of major cases" (*Breeding Transfer Co.*, 110 NLRB 493, 35 LRRM 1020, 1021), and this Court has approved that policy. *NLRB* v. *Denver Bldg. & Const. Trades Council*, 341 U.S. 675, 684. But such policies, which clearly serve to effectuate the Act's purposes, will be frustrated if a state or arbitrator is precluded from acting even in circumstances where the National Board declines jurisdiction, because then the Board will be compelled to take jurisdiction over all cases, no matter how minor the effect upon commerce. Otherwise "offenders . . . may destroy property without liability for the damage done". *United Construction Workers* v. *Laburnum Construction Corp.*, 347 U.S. 656, 669. The Board's time and personnel will thus be devoted to minor matters to the detriment of its proper handling of much more important ones.

E. Petitioners' Contention Based Upon the Proviso to Section 10(a) of the Act Is Untenable.

Petitioners argue at length in their brief that unless the National Board has ceded jurisdiction to a state board in the manner provided in the proviso to Section 10(a) of the Act, a state may not act in a labor dispute affecting commerce (Pet. Br., pp. 59-83). This argument, we submit, is unsound. First, the proviso to Sec. 10(a) shows by its terms that it applies only to a case where the Board asserts jurisdiction. When that occurs, the proviso spells out the manner and circumstances under which the Board may cede that asserted jurisdiction to

a state agency. On the other hand, where the Board does not enter an area at all, the Sec. 10(a) proviso is wholly inapplicable. Then, the states may act under fundamental principles which recognize the competence of states to regulate and control labor relations and disputes save only as the Congress has pre-empted the area; and there is no basis for implying the exclusion of this fundamental state authority when the Congress, through its duly constituted agency, the National Board, declines to enter a particular area.

Second, the proviso to Sec. 10(a) was enacted by Congress to solve the problem posed by this Court's decision in the *Bethlehem Steel* case, 330 U.S. 767, which seemed to hold that there was no manner in which the National Board could cede jurisdiction to a state agency. See *S. Rept. 105*, 80th Cong., 1st Sess., Part 1, p. 6 and Part 2, p. 38. But the *Bethlehem Steel* case involved a nation-wide steel company over which the Board has always asserted jurisdiction. Plainly then what Congress was seeking to do in the Sec. 10(a) proviso was to create a method whereby in cases where the Board does assert jurisdiction, it may cede that jurisdiction to a state agency. *Bethlehem Steel* in no way dealt with the problem here presented and this Court recognized that fact. 330 U.S. 767 at 776. That being the case and the Bethlehem Steel decision being the reason why Congress enacted the Sec. 10(a) proviso, there is no basis for attributing to Congress an intent to deal with the problem in such proviso.

Third, the debates on the Taft-Hartley Act conference report show that Congress did not intend by the Act to interfere with the administration of state laws. 93 Cong. Rec. 6540.[5] Yet Petitioners' construction of the Sec. 10(a)

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[5] This is subject, of course, to the qualification that the state laws may not conflict with the federal law. As we have shown, there can be no such conflict where the National Board declines to act.

proviso would lead to a vast amount of such interference, a result directly contrary to the foregoing expression of Congressional wilk Since, as we have shown, no such construction is necessary in órder to give meaning and effect to the Sec. 10(a) proviso, the proviso should not be so construed.

Petitioners appear also to argue that there can be a uniform application of law in labor controversies only if states are precluded from acting except under cession agreements with the National Board. In answer, it should be pointed out first that there would be no such uniformity under Petitioners' position, unless the National Board took jurisdiction over every case, an obviously impossible situation in view of the budgetary limitations upon the Board. Second, by limiting the cession provision of Section 10(a) to areas where the National Board asserts jurisdiction, uniformity is achieved in those areas, for cession is allowed only if the state law is consistent with the federal. But where the federal government stays out of the area entirely, uniformity is unimportant because then there can be no possible conflict between federal and state authority. *Supra*, pp. 6-7. And finally, whatever merit there is to Petitioners' uniformity argument is far out-weighed by the overriding necessity of giving a person his day in court when he has suffered unlawful wrong. If he cannot have that day before the National Board, he should certainly be allowed it through state action.[6]

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[6] Contrary to Petitioners' contention, no inferences can be drawn from the failure of Congress to repeal the proviso to Section 10(a). As Respondent points out in its brief, Petitioners' reliance here is at best only upon "incompleted steps in the legislative process" and this Court will not draw inferences from such incompleted steps. *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 47-48.

CONCLUSION

The judgment below, holding that the state court had jurisdiction over the labor controversy here involved, should be affirmed.

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1956

No. 41

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, LOCAL NO. 427, A. F. L., et al.,

Petitioners,

v.

FAIRLAWN MEATS, INC.,

Respondent.

No. 280

P. S. GUSS d/b/a PHOTO SOUND PRODUCTS MANUFACTURING COMPANY,

Appellant,

v.

UTAH LABOR RELATIONS BOARD,

Respondent.

BRIEF AMICUS CURIAE ON BEHALF OF THE STATES OF FLORIDA, GEORGIA, TEXAS, VERMONT, VIRGINIA, WYOMING AND THE WISCONSIN EMPLOYMENT RELATIONS BOARD

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INDEX

PAGE

QUESTION INVOLVED 2

POSITION OF THE SEVEN STATES FILING THIS BRIEF AS AMICI CURIAE 3

FACTUAL SITUATIONS TO WHICH THIS BRIEF IS ADDRESSED. (THAT SEGMENT OF INTRASTATE INDUSTRIES, WHOSE OPERATIONS ARE WHOLLY WITHIN THE BOUNDARIES OF A SINGLE STATE, AND WHICH ARE COMPARATIVELY SMALL SO AS TO BE WITHIN THE AREA, WHICH THE NATIONAL LABOR RELATIONS BOARD HAS FOUND TO HAVE "INTRINSICALLY LOCAL CHARACTERISTICS AS AGAINST THOSE HAVING A SUBSTANTIAL IMPACT UPON COMMERCE") 4

SUMMARY OF ARGUMENT 6

ARGUMENT 9-34

I. STATE JURISDICTION TO REGULATE LABOR RELATIONS IN INTRASTATE ENTERPRISES, WHOSE OPERATIONS ARE PRIMARILY LOCAL, IS NOT OUSTED UNLESS CONGRESS MANIFESTS AN UNAMBIGUOUS PURPOSE TO THAT EFFECT 9

II. THERE IS NOTHING IN THE WORDS OF THE TAFT-HARTLEY ACT, OR IN ITS LEGISLATIVE HISTORY, TO MANIFEST AN UNAMBIGUOUS PURPOSE TO PRECLUDE STATES FROM REGULATING THEIR INTERNAL LABOR RELATIONS 10

PAGE

III. FAILURE OF CONGRESS TO CHANGE PROVISIONS OF THE TAFT-HARTLEY ACT SHOW ITS APPROVAL OF THE JUDICIAL PRONOUNCEMENT THAT THE LAW DOES NOT SUPERSEDE STATE LEGISLATION, WHERE NO CONFLICT EXISTS 12

IV. CONGRESS HAS ACQUIESCED IN THIS COURT'S PRONOUNCEMENT THAT APPLICATION OF THE FEDERAL ACT TO INTRASTATE ENTERPRISES IS DEPENDENT ON A FINDING BY THE NATIONAL LABOR RELATIONS BOARD THAT SUCH ENTERPRISES AFFECT COMMERCE IN SUCH A "CLOSE AND INTIMATE FASHION AS TO BE SUBJECT TO FEDERAL CONTROL"; AND IN THIS COURT'S RECOGNITION THAT THE AREA TO WHICH THE BOARD DOES NOT APPLY THE ACT IS A PROPER FIELD FOR "PROTECTIVE ACTION * * * UNDER STATE AUTHORITY" 14

V. THE ADMINISTRATIVE INTERPRETATION OF FEDERAL LEGISLATION HAS BEEN TO THE EFFECT THAT INTRASTATE ENTERPRISES OUTSIDE THE JURISDICTIONAL STANDARDS OF THE NATIONAL LABOR RELATIONS BOARD ARE SUBJECT TO STATE AND LOCAL CONTROL 16

VI. CONGRESS, THROUGH FISCAL ACTION AND OTHERWISE, HAS MANIFESTED ITS APPROVAL OF THE BOARD'S POLICY TO LEAVE CERTAIN TYPES OF INDUSTRIES TO LOCAL REGULATION 19

PAGE

VII. THE BOARD'S ANNOUNCEMENT OF GENERAL POLICIES AS TO NON-EXERCISE OF ITS JURISDICTION IS ANALOGOUS TO A CASE WHERE "EFFECTIVENESS OF FEDERAL SUPERVISION AWAITS FEDERAL ADMINISTRATIVE REGULATION." THIS COURT HAS HELD THAT STATES MAY ACT UNDER SUCH CIRCUMSTANCES 21

VIII. CONGRESS DID NOT INTEND THE LAW TO BE INTERPRETED TO DEFEAT THE CONSTITUTIONAL PURPOSE OF INSURING TO ALL CITIZENS THE "EQUAL PROTECTION OF THE LAW," AS WOULD BE THE CASE IF STATES WERE DENIED THE RIGHT TO GIVE RELIEF TO A PART OF THEIR CITIZENS, WHO HAVE NO OTHER MEANS OF PROTECTION 24

IX. CONSIDERATION OF THE CONSEQUENCES OF EXCLUDING STATES FROM REGULATING INDUSTRIES OUTSIDE THE JURISDICTIONAL STANDARDS OF THE NATIONAL LABOR RELATIONS BOARD INDICATE THAT CONGRESS DID NOT INTEND SUCH EXCLUSION .. 26

X. CESSION UNDER SEC. 10 (a) IS NOT NECESSARY TO ENABLE STATES TO ACT, UNDER RESERVED POWERS, AS TO INDUSTRIES OF WHICH THE NATIONAL LABOR RELATIONS BOARD HAS INDICATED IT WOULD DECLINE JURISDICTION 30

PAGE

XI. CONGRESS INTENDED THAT STATES MIGHT CONTINUE TO EXERCISE RESERVED POWERS, WITH RESPECT TO INTRASTATE INDUSTRIES IN THE CATEGORIES IN WHICH NO FEDERAL REMEDY IS AVAILABLE, WITHOUT FURTHER ACTION OF THE NATIONAL LABOR RELATIONS BOARD AS TO THE SPECIFIC CONTROVERSY 34

CASES CITED

Alabama Federation of Labor v. McAdory, (1945) 325 U. S. 450, 65 S. Ct. 1384, 89 L. ed. 1725 .....15, 24

Alaska S. S. Co. v. United States, (1933) 290 U. S. 256, 54 S. Ct. 159, 78 L. ed. 302 20

Algoma Plywood & Veneer Co. v. Wisconsin Employ. R. Board, (1949) 336 U. S. 301, 69 S. Ct. 584, 93 L. ed. 691 .....9, 13, 30

Amalgamated Ass'n., etc. v. Wisconsin Employ, Rel. Bd., (1951) 340 U. S. 383, 71 S. Ct. 359, 95 L. ed. 364 ....13, 37

Amalgamated Clothing Workers v. Richman Brothers, (1955) 348 U. S. 511, 99 L. ed. 600, 75 S. Ct. 452 27

Amalgamated Utility Workers v. Consolidated Edison Co., (1940) 309 U. S. 261, 84 L. ed. 738, 60 S. Ct. 561 .. 14

Bethlehem Steel Co. v. New York State Labor Rel. Bd., (1947) 330 U. S. 767, 67 S. Ct. 1026, 91 L. ed. 1234 ....3, 5, 6, 9, 21-22, 35

PAGE

Breeding Transfer Co., 110 N. L. R. B. 493 .....4, 5, 17, 28, 34

Capital Service v. National Labor Relations Board, (1953, C. C. A. 9) 204 F. 2d 848 18

Capital Service v. National Labor Relations Board, (1954) 347 U. S. 501, 74 S. Ct. 699, 98 L. ed. 887 13

Charleston Transit Co., 111 NLRB 1214 28

Cascade Natural Gas Corporation, 110 NLRB 947 28

Clay Electrical Coop, Inc., 111 NLRB 175 28

Consolidated Edison Co. v. National Labor Relations Bd., (1938) 305 U. S. 197, 83 L. ed. 126, 59 S. Ct. 206 ....14, 15, 16, 19, 20, 31

C. I. O. v. McAdory, (1945) 325 U. S. 472, 65 S. Ct. 1395, 89 L. ed. 1741 37

Garner v. Teamsters Union, (1953) 346 U. S. 485, 74 S. Ct. 161, 98 L. ed. 228 .....10, 13, 26, 27, 37

Hill v. Florida, (1945) 325 U. S. 538, 65 S. Ct. 1373, 89 L. ed. 1782 27

Howell Chev. Co. v. Labor Board, (1953) 346 U. S. 482, 74 S. Ct. 214, 98 L. ed. 215 19

International Union v. Wisconsin E. R. Board, (1949) 336 U. S. 245, 69 S. Ct. 516, 93 L. ed. 651 ....13, 14, 30, 37

International Union, etc. v. O'Brien, (1950) 339 U. S. 454; 70 S. Ct. 781, 94 L. ed. 978 .....13, 27

PAGE

Joseph v. Carter & Weekes Stevedoring Co., (1947) 330 422, 67 S. Ct. 815, 91 L. ed. 993 12

La Crosse Telephone Corp. v. Wisconsin Employ. Rel. Bd., (1949) 336 U. S. 18, 69 S. Ct. 379, 93 L. ed. 463 ..... 13, 18, 37

Maitrejean v. Metcalfe Construction Co., (C. C. A. Minn. 1948) 165 F. 2d 571 36

National Labor Rel. Bd. v. Denver Bldg. & Const. Tr. Co., (1951) 341 U. S. 675, 71 S. Ct. 943, 95 L. ed. 1284 ..... 16, 20, 27

NLRB v. Fainblatt, (1939) 306 U. S. 601, 83 L. ed. 1014, 59 S. Ct. 668 19

National Labor Relations Bd. v. Jones & Laughlin S. Corp., (1937) 301 U. S. 1, 81 L. ed. 893, 57 S. Ct. 615 ..... 5, 6, 19

Safeway Transit Co., 111 NLRB 1359 28

Schulte, Inc., D. A., v. Gangi, (1946) 328 U. S. 108, 66 S. Ct. 925, 90 L. ed. 1114 36

So. Wyoming Utilities Co., 110 NLRB 1490 28

Suburban Transit, Inc., 111 NLRB 1251 28

Townsend v. Yeomans, (1937) 301 U. S. 441, 57 S. Ct. 842, 81 L. ed. 1210 35

PAGE

United Auto. A. & A. I. W. v. Wisconsin Emp. Rel. Bd., (1956) 351 U. S. 266, 76 S. Ct. 794 .....13, 27, 30, 38

United Workers v. Laburnum Corp., (1954) 347 U. S. 656, 74 S. Ct. 833, 98 L. ed. 1025 .....13, 18, 26, 27, 30

Warren-Bradshaw Drilling Co. v. Hall, (1942) 317 U. S. 88, 87 L. ed. 83, 63 S. Ct. 125 36

Weber v. Anheuser-Busch, Inc., (1955) 348 U. S. 468, 75 S. Ct. 480, 99 L. ed. 546 .....13, 27

Wisconsin E. R. Board v. Gilson Brothers, (1949) 255 Wis. 316, 38 N. W. 2d 483, cert. den. 338 U. S. 891, 70 S. Ct. 240, 94 L. ed. 547 37

Wisconsin E. R. Board v. Plankinton Packing Co., (1950) 338 U. S. 953, 70 S. Ct. 491, 94 L. ed. 588 .....13, 18

STATUTES

Labor Management Relations Act, 1947

29 U. S. C. se . 151-159 13

29 U. S. C. sec. 152 (6) and (7) 5

Sec. (10) (a) 30, 31

REPORTS AND PUBLICATIONS

PAGE

Chairman Herzog in Senate Hearings on Senate Resolution 248, 81st Congress, 2d Session 120 20

Harry A. Millis & Harold A. Katz "A Decade of State Labor Legislation 1937-1947" 15 U. of Chicago Law Review 282-310 21

Arthur E. Sutherland "Commerce, Transportation & Customs" in Studies in Federalism, Robert R. Bowe & Carl J. Friedrich, page 316 25

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Address to Assn. of General Contractors of America, Mar. 1955, 35 L. R. R. 467 38

CONSTITUTION

United States Constitution

Art. XIV 24

N. L. R. B. Press Release R. 28, October 21, 1953 18

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1956

No. 41

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, LOCAL NO. 427, A. F. L., et al.,

Petitioners,

v.

FAIRLAWN MEATS, INC.,

Respondent.

No. 280

P. S. GUSS d/b/a PHOTO SOUND PRODUCTS MANUFACTURING COMPANY,

Appellant,

v.

UTAH LABOR RELATIONS BOARD,

Respondent.

BRIEF AMICUS CURIAE ON BEHALF OF THE STATES OF FLORIDA, GEORGIA, TEXAS, VERMONT, VIRGINIA, WYOMING AND THE WISCONSIN EMPLOYMENT RELATIONS BOARD

QUESTION INVOLVED

The question to which this brief is addressed, and which the above friends of the court deem to be presented by the combined cases of *Amalgamated Meat Cutters, etc. v. Fairlawn Meats, Inc.*, No. 41, and *P. S. Guss, etc. v. Utah Labor Relations Board, et al.*, No. 280, is:

> **Did Congress intend by the passage of the Labor Management Relations Act, 1947, to deny to states the authority to deal with labor relations of those intrastate enterprises which, although affecting interstate commerce to some extent, do not meet the jurisdictional standards of the National Labor Relations Board, regardless of whether the National Labor Relations Board has specifically declined to act in a particular controversy?**

POSITION OF THE SEVEN STATES FILING THIS BRIEF AS AMICI CURIAE

This brief is submitted by the chief law enforcement officers of the above states, whose duty and responsibility it is to preserve internal peace and to administer justice to their citizens. Such officers are of the opinion that a negative answer to the foregoing question is essential if they are to be enabled to perform their functions justly and adequately.

The participating states have by no means uniform regulation in the field of labor relations; and so this brief is not addressed to the defense of any particular type of legislation. It is deemed that the preservation of industrial peace within state boundaries is a matter "primarily of interest to the state";[1] and so it is respectfully submitted that a rule be adopted recognizing the reserved powers of states to deal with a subject so vital to their citizens, by whatever means they find best meet peculiar local conditions—whether by general legislation, judicial control under principles of common law, administrative regulation, criminal prosecution, or otherwise—always providing that constitutional rights of each individual are respected.

The area of state authority which this brief seeks to support is, however, limited to enforcement of state law, and takes no position with respect to any attempt by a state to enforce federal policies as such.

This brief is filed on behalf of the States of Florida, Georgia, Texas, Vermont, Virginia, Wyoming and the Wisconsin Employment Relations Board, as friends of the court.

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[1]Bethlehem Steel Co. v. New York State Labor Rel Bd., (1947) 330 U. S. 767, 772, 67 S. Ct. 1026, 91 L. ed. 1234.

FACTUAL SITUATIONS TO WHICH THIS BRIEF IS ADDRESSED (THAT SEGMENT OF INTRASTATE INDUSTRIES, WHOSE OPERATIONS ARE WHOLLY WITHIN THE BOUNDARIES OF A SINGLE STATE, AND WHICH ARE COMPARATIVELY SMALL SO AS TO BE WITHIN THE AREA, WHICH THE NATIONAL LABOR RELATIONS BOARD HAS FOUND TO HAVE "INTRINSICALLY LOCAL CHARACTERISTICS AS AGAINST THOSE HAVING A SUBSTANTIAL IMPACT UPON COMMERCE"[1])

Some of the participating states might wish to extend arguments as to state jurisdiction to situations and areas not presented by the cases before the court; and are not precluded from doing so by limitations recognized in this brief. The arguments here presented, however, are related solely to factual situations similar to the cases in which the brief is entitled.

1. Both enterprises operate solely in intrastate commerce, wholly within the boundaries of a single state.

The historical dividing line between interstate and intrastate enterprise is disregarded by many writers discussing jurisdiction under the Labor Management Relations Act, 1947, because the law may by applied to both. When the issue is the extent to which Congress intended to preclude state action, however, the fact that an industry lies within the traditional field of reserved powers of states, may have some bearing.

The Labor Management Relations Act, 1947, did not eliminate the line between interstate and intrastate com-

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[1]Breeding Transfer Co., 110 N. L. R. B. 493, 496.

merce, as judicially defined, although it extended the scope of federal regulation into the intrastate area.[1] This court has recognized that far greater enterprises than the ones here involved—enterprises with multi-state plants, affiliates, and subsidiaries—were intrastate enterprises, subject to federal law only because of their *effect* upon commerce.[2]

The labor relations of the small firms involved in these cases are, to a far greater degree than the manufacturing concerns of which this court spoke in the following words, "primarily of interest to the state" because:

> "* * * they draw their labor supply from its residents, and the impact of industrial strife in their plants is immediately felt by state police, welfare and other departments. Their labor relations are primarily of interest to the state, are within its competence legally and practically to regulate, and until recently were left entirely to state control. Thus, the subject matter is not so 'intimately blended and intertwined with responsibilities of the national government' that its nature alone raises an inference of exclusion. *Cf. Hines v. Davidowitz*, 312 U. S. 52, 66."[3]

2. The volume of operations of both enterprises is comparatively small, so that they unquestionably fall in the area classified by the National Labor Relations Board, on the basis of its years of experience, as "having intrinsically local characteristics"[4] so that the National Board would decline to assert jurisdiction over them.

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[1] See sec. 2, subsets. (6) and (7) of the Labor Management Relations Act. 29 U. S. C. sec. 152 (6) and (7).

[2] National Labor Relations Bd. v. Jones & Laughlin S. Corp., (1937) 301 U. S. 1, 81 L. ed. 893, 57 S. Ct. 615; Bethlehem Steel Co. v. New York State Labor Rel. Bd., (1947) 330 U. S.767, 67 S. Ct. 1026, 91 L. ed. 1234.

[3] Bethlehem Steel Co. v. New York State Labor Rel. Bd., (1947) 330 U. S. 767, 772, 67 S. Ct. 1026, 91 L. ed. 1234.

[4] Breeding Transfer Co., 110 N. L. R. B. 493, 496.

The limits of the operations of the enterprises are established by the records in both cases, and conceded by the parties to be outside the jurisdictional standards of the National Labor Relations Board. For purposes of this brief, it is conceded that such enterprises as were involved in the *Bethlehem Steel* and *Jones-Laughlin* cases, supra, are still beyond the purview of state regulation.

SUMMARY OF ARGUMENT

The firms involved in these cases are comparatively small ones, whose operations are solely in intrastate commerce, and of the class determined by the National Board to have "intrinsically local characteristics."

There is nothing in the words of the Taft-Hartley Act to manifest a Congressional purpose to exclude states from regulating in such cases; and the records of Congressional debates show a contrary intent.

Congress' failure to change the law shows its approval of the pronouncements by this court that state regulation is permissible where there is no conflict with federal law or administration.

Congress has acquiesced in this court's pronouncement that "state protective action" is appropriate with respect to industries of which the National Board could, but does not, take jurisdiction; and that such state action is one of the grounds upon which the National Board may determine that the National Act should not be applied.

Throughout the history of federal labor legislation, the administrative interpretation has been that states have au-

thority to regulate industries outside the jurisdictional standards of the National Board. Congress has manifested its approval of the administrative interpretation.

The National Board's pronouncement of jurisdictional standards has defined a "distinct segment" on which the federal agency does not act. Under the rules pronounced by this court, states may act in such area.

Congress did not intend the law to be interpreted so as to prevent states from giving "equal protection of the law," which would be the result if they could give relief to persons working in industries not affecting commerce, but must deny it to other citizens who have no remedy elsewhere.

There can be neither actual nor potential conflict from permitting states to regulate in an area to which federal law is not applied. Any over-stepping by a state can be readily tested as has been done in the many cases of the past.

The list of industries which would be excluded from *any* regulation, if it were held states could not deal with industries outside the jurisdictional standards of the National Labor Relations Board which affect interstate commerce to an insubstantial extent, include some so important to local welfare that Congress could not have intended to remove them from local control.

Congress must be deemed to have acquiesced in this court's ruling that cession of jurisdiction by the National Board is not necessary to enable states to act, except where conflict in administration might otherwise result. There is no possibility of such conflict in these cases.

The National Board's purpose, to relieve itself of attention to certain areas of industry in order to concentrate on more important cases, could not be realized if it must implement its declination of jurisdiction on a case-by-case basis. The "case-by-case" test has long since been rejected as a boundary line between federal and state authority, with apparent Congressional approval.

The National Board's jurisdictional standards have been so defined as to be easily ascertainable by mathematical calculation, without exercise of discretion.

There has never heretofore been a presumption that a local industry is engaged in, or has an effect upon, interstate commerce, without affirmative proof. Until affirmative proof is offered to show that an intrastate firm is subject to federal regulation, it should be presumed, as in all other cases, that the firm is subject to local control.

The need for prompt action to avert industrial friction is a consideration Congress had in mind. It did not intend that appropriate action should be delayed by unnecessary preliminary formalities.

ARGUMENT

I.

STATE JURISDICTION TO REGULATE LABOR RELATIONS IN INTRASTATE ENTERPRISES, WHOSE OPERATIONS ARE PRIMARILY LOCAL, IS NOT OUSTED UNLESS CONGRESS MANIFESTS AN UNAMBIGUOUS PURPOSE TO THAT EFFECT

For purposes of this argument, it may be conceded that Congress could, *if it chose,* exclude states from acting, because of "close and substantial relation to interstate traffic."[1] This court has stated, however, that federal legislation does not oust state law in such cases unless Congress has "manifested an unambiguous purpose that it should be supplanted."[2]

The question here presented is one of ascertaining the purpose of Congress, and so resort will no doubt be had—as in previous cases—to the usual methods of ascertaining legislative intent.

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[1]**Bethlehem Steel Co. v. New York State Labor Rel. Bd.,** (1947) 330 U. S. 767, 772, 67 S. Ct. 1026, 91 L. ed. 1234.

[2]**Algoma Plywood & Veneer Co. v. Wisconsin Employ. R. Board,** (1949) 336 U. S. 301, 312, 69 S. Ct. 584, 93 L. ed. 691.

II.

THERE IS NOTHING IN THE WORDS OF THE TAFT-HARTLEY ACT, OR IN ITS LEGISLATIVE HISTORY, TO MANIFEST AN UNAMBIGUOUS PURPOSE TO PRECLUDE STATES FROM REGULATING THEIR INTERNAL LABOR RELATIONS

There is nothing in the express terms of the Taft-Hartley Act to exclude state action. Indeed, the court has recognized that preclusion of state action does not result from terms of the law, but rests upon inferences from "conflicting indications of congressional will."[1] Neither was there any word in the debates prior to adoption of the act to indicate a purpose on the part of Congress to displace state action. Expressions of opinion on the subject were to the contrary.

For example, see 1 Legislative History of the Labor Management Relations Act, 1947, p. 883, where the following questions and answers appear:

> "MR. KERSTEN of Wisconsin. * * * I would like to ask the gentleman about that portion which pertains to the validity of State laws. Wisconsin and other States have their own labor relations laws. We are very anxious that disputes be settled at the State level insofar as it is possible. Can the gentleman give us assurance on that proposition, so that it is a matter of record, that that is the sense of the language and of the report?
>
> "MR. HARTLEY. That is the sense of the language of the bill and of the report. That is my interpretation

[1]Garner v. Teamsters Union, (1953) 346 U. S. 485, 488, 74 S. Ct. 161, 98 L. ed. 228.

of the bill, that this will not interfere with the State of Wisconsin in the administration of its own laws. In other words, this will not interfere with the validity of the laws within that State.

"MR. KERSTEN of Wisconsin. And it will permit as many of these disputes to be settled at the State level as possible?

"MR. HARTLEY. Exactly."

Senator Wiley, who supported the legislation, called the attention of the Senate to regulation by state labor boards shortly before the respective senate and house bills were referred to the conference committee:

"I have urged my colleagues on the Labor Committee, who will take this bill to conference, to insure the concurrent jurisdictions of State labor boards and the National Labor Board, so that insofar as possible each of the State boards may handle problems at the State level, rather than attempt to send all of the problems to Washington to be decided far from the scene of the dispute."

2 Legislative History of the Labor Management Relations Act, 1047, p. 1471.

Even more persuasive than such general expressions is the circumstance that during the arguments no objection was raised on the ground that the law *displaced* or *superseded* any state regulation, although there were numerous references to *duplicating* state law. What is *duplicated* is not *superseded*. Surely, if there had been a prevalent intent to oust state jurisdiction in matters of local concern, at least without insuring a commensurable assump-

tion of responsibility by federal agencies, there would have been *some* voices raised in protest on such ground.

III.

FAILURE OF CONGRESS TO CHANGE PROVISIONS OF THE TAFT-HARTLEY ACT SHOW ITS APPROVAL OF THE JUDICIAL PRONOUNCEMENT THAT THE LAW DOES NOT SUPERSEDE STATE LEGISLATION, WHERE NO CONFLICT EXISTS

The records show that Congress has been well aware of the words of this court in the many cases involving the question of legislative intent as to federal-state jurisdiction under the Taft-Hartley Act. It is an accepted basis of statutory interpretation that failure to change the provisions of a law on which a judicial interpretation is based manifests legislative approval of that interpretation.[1]

Whatever arguments may have been made for or against the rules embodied in earlier decisions on the question of state-federal jurisdiction, Congressional inaction since 1947 has made them a part of the substantive law.

The last major change in the federal law was effected by enactment of the Labor Management Relations Act,

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[1] **Joseph v. Carter & Weekes Stevedoring Co.,** (1947) 330 U. S. 422, 428, 67 S. Ct. 815, 91 L. ed. 993:

> "• • • As the power lies in Congress under the Clause [Commerce] to make any desired adjustment in the taxation area, its acquiescence in our former rulings on state taxation indicates its agreement with the adjustments of the competing interests of commerce and necessary state revenues. • • •"

1947;[1] and so this court's pronouncements since that time, together with Congressional inaction, have become a part of the law as if written into it.

There have been at least 11 cases[2] in which this court has dealt directly or indirectly with the matter of state authority as to labor relations, since enactment of the Taft-Hartley Act. Even in those cases in which the state regulation was held to have been ousted by Congressional occupation of the field, it was uniformly recognized that Congress had not occupied the entire field, but that the Taft-Hartley law "leaves much to the states."[3] In all cases in which this court has held that Congress intended to oust state jurisdiction, the Congressional intent has been inferred on the basis of conflict with, or frustration of, basic Congressional purposes and objectives. The basic rule laid down by the cases, upon which Congress can be presumed to have relied, is well expressed by this court in the following words:[4]

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[1] 29 U. S. C., secs. 151-159.

[2] **United Auto. A. & A. I. W. v. Wisconsin Emp. Rel. Bd.**, (1956) 351 U. S. 266, 76 S. Ct. 794;
Weber v. Anheuser-Busch, Inc., (1955) 348 U. S. 468, 75 S. Ct. 480, 99 L. ed. 546;
United Workers v. Laburnum Corp., (1954) 347 U. S. 656, 74 S. Ct. 833, 98 L. ed. 1025;
Capital Service v. National Labor Relations Board, (1954) 347 U. S. 501, 74 S. Ct. 699, 98 L. ed. 887;
Garner v. Teamsters Union, (1953) 346 U. S. 485, 74 S. Ct. 161, 98 L. ed. 228;
International Union, etc. v. O'Brien, (1950) 339 U. S. 454, 70 S. Ct. 781, 94 L. ed. 978;
Amalgamated Ass'n., etc. v. Wisconsin Employ. Rel. Bd., (1951) 340 U. S. 383, 71 S. Ct. 359, 95 L. ed. 364;
Wisconsin E. R. Board v. Plankinton Packing Co., (1950) 338 U. S. 953, 70 S. Ct. 491, 94 L. ed. 588;
Algoma Plywood & Veneer Co. v. Wisconsin Employ. R. Board, (1949) 336 U. S. 301, 69 S. Ct. 584, 93 L. ed. 691;
International Union v. Wisconsin E. R. Board, (1949) 336 U. S. 245, 69 S. Ct. 516, 93 L. ed. 651;
La Crosse Telephone Corp. v. Wisconsin Employ. Rel. Bd., (1949) 336 U. S. 18, 69 S. Ct. 379, 93 L. ed. 463.

[3] **Garner v. Teamsters Union**, (1953) 346 U. S. 485, 488, 74 S. Ct. 161, 98 L. ed. 228.

[4] **United Workers v. Laburnum Corp.**, (1954) 347 U. S. 656, 665, 74 S. Ct. 833, 98 L. ed. 1025.

"* * * The care we took in the *Garner* case to demonstrate the existing conflict between state and federal administrative remedies in that case was, itself, a recognition that if no conflict had existed, the state procedure would have survived. * * *"

Similarly, Congress may be deemed to have acquiesced in the rule laid down by this court that, in any case where "conduct is governable by the State or it is entirely ungoverned,"[1] the states may continue to act under their reserved powers.

IV.

CONGRESS HAS ACQUIESCED IN THIS COURT'S PRONOUNCEMENT THAT APPLICATION OF THE FEDERAL ACT TO INTRASTATE ENTERPRISES IS DEPENDENT ON A FINDING BY THE NATIONAL LABOR RELATIONS BOARD THAT SUCH ENTERPISES AFFECT COMMERCE IN SUCH A "CLOSE AND INTIMATE FASHION AS TO BE SUBJECT TO FEDERAL CONTROL"; AND IN THIS COURT'S RECOGNITION THAT THE AREA TO WHICH THE BOARD DOES NOT APPLY THE ACT IS A PROPER FIELD FOR "PROTECTIVE ACTION * * * UNDER STATE AUTHORITY"

The Labor Management Relations Act was not intended to be self-executing. It can be applied only through the office of the National Labor Relations Board.[2]

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[1] **International Union v. Wisconsin E. R. Board,** (1949) 336 U. S. 245, 254, 69 S. Ct. 516, 93 L. ed. 651.

[2] **Consolidated Edison Co. v. National Labor Relations Bd.,** (1938) 305 U. S. 197, 223, 83 L. ed. 126, 59 S. Ct. 206;

[3] **Amalgamated Utility Workers v. Consolidated Edison Co.,** (1940) 309 U. S. 261, 84 L. ed. 738, 60 S. Ct. 561.

As this court has ruled:[1]

> "* * * The National Labor Relations Act does not extend to all industries and all employees. It is only applicable to those employments in which strikes and labor disputes would affect interstate commerce and *are found to be such by the National Labor Relations Board.* * * *" (Emphasis supplied)

Determination of the "factual question" whether "the conduct of intrastate enterprises does affect * * * commerce in such a close and intimate fashion as to be subject to federal control"[2] is a function left to the National Labor Relations Board, and a function which gives it considerable leeway for exercise of administrative discretion.

Where the application of a law is made dependent upon the discretion of an administrative agency, there are many cases in which the agency might reach divergent results, either of which would be upheld by a reviewing court. Although the discretion may be exercised on a generalized, rather than a case-by-case basis, the situation is analogous to determinations by a jury or other fact-finding agency.

Congress' intent that intrastate industries, which the National Labor Relations Board has found not to "affect commerce in such a close and intimate fashion as to be subject to federal control," should remain subject to state authority is clear from its acquiescence in the *Consolidated Edison* case. The court there recognized that one of the very circumstances which the national board should con-

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[1] **Alabama Federation of Labor v. McAdory,** (1945) 325 U. S. 450, 464, 65 S. Ct. 1384, 89 L. ed. 1725;

[2] **Consolidated Edison Co. v. National Labor Relations Bd.,** (1938) 305 U. S. 197, 222-223, 83 L. ed. 126, 59 S. Ct. 206.

sider was "the bearing and effect of any protective action to the same end already taken under state authority."[1]

The case was decided prior to enactment of the Taft-Hartley Act; but Congress has made no change in the provisions upon which the pronouncement was based, thus manifesting its approval of this court's recognition of residual state authority over enterprises of which the National Labor Relations Board elects not to take jurisdiction.

V.

THE ADMINISTRATIVE INTERPRETATION OF FEDERAL LEGISLATION HAS BEEN TO THE EFFECT THAT INTRASTATE ENTERPRISES OUTSIDE THE JURISDICTIONAL STANDARDS OF THE NATIONAL LABOR RELATIONS BOARD ARE SUBJECT TO STATE AND LOCAL CONTROL

This court has stated that interpretation and application of the federal law by the National Labor Relations Board is entitled to "weight in doubtful situations."[2]

The following statement of former General Counsel George F. Bott is a summation of the position of the board based on years of experience:

> "In practice the Board never has, and I think I may confidently predict it never will, interfere to block state action in a situation where the Board chooses to stay its hand because it believes the impact of the activity on commerce to be insubstantial. . . . To me it seems

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[1] Consolidated Edison Co. v. National Labor Relations Bd., (1938) 305 U. S. 197, 223, 83 L. ed. 126, 59 S. Ct. 206.

[2] National Labor Rel. Bd. v. Denver Bldg. & Const. Tr. Co., (1951) 341 U. S. 675, 692, 71 S. Ct. 943, 95 L. ed. 1284.

clear that as a matter of policy there is no reason why a state should not be free to act in this situation.'"[1]

In the board's decisions curtailing its jurisdiction in 1954, both the majority and minority assumed that the board's declination of jurisdiction was a relinquishment of the abandoned area to local control. The only difference of opinion was whether that was desirable. For example, in *Breeding Transfer Co.*, the minority opinion stated in part:[2]

> "In summary, it is my firm conviction that the new standards are in basic conflict with the Act and the legal responsibilities which it imposes on this Agency. They are premised upon the view that there should be a reallocation of authority between the Federal Government and the States in the regulation of labor relations, with the Federal Government and this Board surrending jurisdiction in wide areas. * * *"

The majority opinion countered:[3]

> "* * * If one of the inevitable consequences of our action is to leave a somewhat larger area for local regulation of disputes, we do not share our colleagues' apparent view that this is a sinister development. * * *"

The majority action was a considered relinquishment of a field for the exercise of the states' reserved powers.

Prior to the foregoing decision, while the matter of curtailment of National Labor Relations Board jurisdiction was under consideration, Chairman Guy Farmer said:

> "'Regardless of the legal scope of the commerce clause the federal agencies should, as a matter of self-

[1] 34 LRR 67, 68-69 (1954).
[2] 110 NLRB 501.
[3] 110 NLRB 497.

> restraint, impose limits on their own power and thus provide the opportunity for local problems to be settled on a local basis by the citizens of the communities in which these problems arise.' "[1]

The national board has appeared before the courts, either directly as a party[2] or as *amicus curiae*[3] to oppose the recognition of state jurisdiction where the board believed state action would interfere with the operation of the federal legislation. With respect to industries of which the board has declined jurisdiction, however, the board's position has been stated at page 11 of its memorandum filed in the *Laburnum* case:[4]

> "It [the Board] has, however, as a matter of practice repeatedly refrained from intervening in any way in situations where the States, despite the absence of any cession agreement, have taken action with respect to industries over which the Board as a matter of policy declines to take jurisdiction. See *Almeida Bus Service*, 99 N. L. R. B. 498, 500-501."

The expressions of the National Labor Relations Board, and its actions, from 1935 through 1954, have uniformly manifested its interpretation of the law as leaving to state and local control those industries of which it elects to decline jurisdiction.

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[1] **NLRB Press Release R-28**, October 21, 1953;

[2] **Capital Service v. National Labor Relations Board**, (1953, C. C. A. 9) 204 F. 2d 848;

[3] **La Crosse Telephone Corp. v. Wisconsin Employ. Rel. Bd.**, (1949) 336 U. S. 18, 69 S. Ct. 379, 93 L. ed. 463;

Wisconsin E. R. Board v. Plankinton Packing Co., (1950) 338 U. S. 953, 70 S. Ct. 491, 94 L. ed. 588;

[4] **United Workers v. Laburnum Corp.**, (1954) 347 U. S. 656, 74 S. Ct. 833, 98 L. ed. 1025.

VI.

CONGRESS, THROUGH FISCAL ACTION AND OTHERWISE, HAS MANIFESTED ITS APPROVAL OF THE BOARD'S POLICY TO LEAVE CERTAIN TYPES OF INDUSTRIES TO LOCAL REGULATION

The determination of the National Labor Relations Board to take jurisdiction of a dispute under the federal act has always been based upon a factual finding that the matter affects commerce.[1]

Such findings were originally made "as the individual cases arise;[2] but the board adopted the administrative practice in 1950 of defining general categories of industries with respect to which it would accept or decline jurisdiction, thus announcing the limits to which the act would be applied. The board's policy of declining jurisdiction of certain industries, on the ground that their impact over commerce is slight, has been impliedly approved by Congress, not only through acquiescence in the decision of this court in

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[1]As to intrastate enterprises, at least, such a finding has apparently been deemed a prerequisite to assumption of jurisdiction from the early days of administration of federal law to the present. See, for examples, **Howell Chev. Co. v. Labor Board,** (1953) 346 U. S. 482, 74 S. Ct. 214, 215, 98 L. ed. 215; **NLRB v. Fainblatt,** (1939) 306 U. S. 601, 83 L. ed. 1014, 59 S. Ct. 668; **Consolidated Edison Co. v. National Labor Relations Bd.,** (1938) 305 U. S. 197, 83 L. ed. 126, 59 S. Ct. 206; **National Labor Relations Bd. v. Jones & Laughlin S. Corp.,** (1937) 301 U. S. 1, 81 L. ed. 893, 57 S. Ct. 615;

[2]**National Labor Relations Bd. v. Jones & Laughlin S. Corp.,** (1937) 301 U. S. 1, 32, 81 L. ed. 893, 57 St. Ct. 615.

National Labor Relations Board v. Denver Bldg. & Const. Trades Council,[1] but through its fiscal action.[2]

Perhaps the chief of the "existing circumstances" which has formed the basis of the board's findings, in limiting its jurisdiction, is the lack of funds to enable it to handle all cases of predominantly local nature, without detriment to those having a greater impact upon commerce. The budgetary basis of such curtailment was early made known to Congress:[3] and so the fact that budgetary considerations have continued to be one of the bases for limiting application of the federal act shows that it was Congress' purpose to leave an unoccupied area.

The board's declination of jurisdiction, in practically all cases, has been in recognition of the predominantly local nature of the excluded industries. In view of the pronouncement of this court that one of the circumstances which might be considered in rejecting jurisdiction is "the bearing and effect of any protective action to the same end already taken under state authority,"[4] it may be presumed that the board had that factor in mind in narrowing its field of operation.

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[1] **N. L. R. B. v. Denver Bldg. & Trades Council,** (1951) 341 U. S. 675, 71 S. Ct. 943, 95 L. ed. 1284.

[2] It has been recognized that the intent of Congress as to interpretation of a law may be revealed through its action on appropriations. It was said in **Alaska S. S. Co. v. United States,** (1933) 290 U. S. 256, 262, 54 S. Ct. 159, 78 L. ed. 302, that:

> "• • • That [administrative] construction must be accepted and applied by the courts when, as in the present case, it has received congressional approval implicit in the annual appropriations over a period of thirty-five years, the expenditure of which was effected by resort to the administrative practice • • •."

[3] See, for example, the testimony of Chairman Herzog, in Senate Hearings on Senate Resolution 248, 81st Congress, 2d Session, 120;

[4] **Consolidated Edison Co. v. National Labor Relations Bd.,** (1938) 305 U. S. 197, 223, 83 L. ed. 126, 59 S. Ct. 206.

That presumption is fortified by the fact that the national board's progressive narrowing of its jurisdiction was accompanied by an increase in state regulation.[1]

In the light of the board's recognition that its declination of jurisdiction relinquishes an area for local regulation, Congress' continuance in the fiscal policy which resulted in narrowing the application of federal law must indicate its approbation of local regulation in predominantly local enterprises.

VII.

THE BOARD'S ANNOUNCEMENT OF GENERAL POLICIES AS TO NON-EXERCISE OF ITS JURISDICTION IS ANALOGOUS TO A CASE WHERE "EFFECTIVENESS OF FEDERAL SUPERVISION AWAITS FEDERAL ADMINISTRATIVE REGULATION." THIS COURT HAS HELD THAT STATES MAY ACT UNDER SUCH CIRCUMSTANCES

Since the National Labor Relations Board is an administrative agency, its action must be regarded either as an exercise of its rule-making power or of its fact-finding functions. The generality of the pronouncements here involved gives them some of the characteristics of an administrative rule.

This court has indicated that the following interpretative rules would be applied with respect to labor legislation:

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[1]Harry A. Millis & Harold A. Katz "A Decade of State Labor Legislation 1937-1947," 15 U. of Chicago Law Review 282-310.

[2]**Bethlehem Steel Co. v. New York State Labor Rel. Bd.**, (1947) 330 U. S. 767, 774, 67 St. Ct. 1026, 91 L. ed. 1234.

"* * * In other cases, Congress has passed statutes which initiate regulation of certain activities, but where effective regulation must wait upon the issuance of rules by an administrative body. In the interval before those rules are established, this Court has usually held that the police power of the state may be exercised. * * * However, when federal administrative regulation has been slight under a statute which potentially allows minute and multitudinous regulation of its subject, cf. *Atlantic Coast Line R. Co. v. Georgia*, 234 U. S. 280, or even where extensive regulations have been made, if the measure in question relates to what may be considered a separable or distinct segment of the matter covered by the federal statute and the federal agency has not acted on that segment, the case will be treated in a manner similar to cases in which the effectiveness of federal supervision awaits federal administrative regulation, *Northwestern Bell Telephone Co. v. Nebraska State Commission, supra; Welch Co. v. New Hampshire, supra.* The states are in those cases permitted to use their police power in the interval. *Terminal Railroad Assn. v. Brotherhood of Railroad Trainmen*, 318 U. S. 1. * * *"[1]

The action of the National Labor Relations Board in announcing general standards on which it would accept or reject jurisdiction has identified a "separable or distinct segment" of the matter covered by the federal act which "will be treated in a manner similar to cases in which the effectiveness of federal supervision awaits federal administrative regulation," so that "the police power of the state may be exercised."

Had the National Labor Relations Board exercised its discretion at the inception of administration under the fed-

[1]Id. loc. cit. 330 U. S. 773-774.

eral labor legislation, either by rule or by a series of findings, that it would not enter designated intrastate areas, there would probably have been little question that those areas would continue under state jurisdiction—since they involve a field traditionally subject to state control. Surely the fact that the boundary lines have been carved out as a result of experience rather than as a matter of first impression does not alter the substance of the action.

If Congress had itself defined the limits of regulation in the terms of the act, as the National Labor Relations Board has done administratively, it would probably not be questioned that intrastate enterprises outside those limits would remain subject to state control. Likewise, if Congress had first fixed the limit of its regulation at one line, and then withdrawn to another, it would doubtless be held that the reserved state power—which remained dormant, though superseded—would again occupy the vacated area.

Why should the situation be different, where Congress has delegated to an administrative agency the authority to define the extent of its regulation?

VIII.

CONGRESS DID NOT INTEND THE LAW TO BE INTERPRETED TO DEFEAT THE CONSTITUTIONAL PURPOSE OF INSURING TO ALL CITIZENS THE "EQUAL PROTECTION OF THE LAW," AS WOULD BE THE CASE IF STATES WERE DENIED THE RIGHT TO GIVE RELIEF TO A PART OF THEIR CITIZENS, WHO HAVE NO OTHER MEANS OF PROTECTION

It is recognized, at least in theory, that there are some labor relations within the states which Congress cannot reach under the Commerce Clause of the Constitution.[1] As to such enterprises, a state may undoubtedly apply its laws so as to furnish protection to its citizens.

An interpretation of the federal law which would leave states free to furnish a remedy to a citizen in one case, but would obligate it to deny the same remedy to another citizen—even though there is no other means by which the latter might obtain protection—would violate the spirit of Art. XIV of the Constitution which provides that:

> "* * * no state shall * * * deny to any person within its jurisdiction the equal protection of its laws."

To illustrate the result of holding states ousted from the area in which the National Labor Relations Board has relinquished jurisdiction, let us take two hypothetical cases.

An employee in a purely intrastate enterprise, which does not "affect" commerce, is wrongfully discharged because of labor union activities. Another employee, in an

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[1] **Alabama Federation of Labor v. McAdory, (1945) 325 U. S. 450, 65 S. Ct. 1384, 89 L. ed. 1725.**

enterprise which "affects" commerce but is outside the National Labor Relations Board jurisdictional standards, is also wrongfully discharged for the same reason.

The first employee can go to his state courts for a remedy. The second can secure no remedy under the federal law; but is it also to be held that his state is precluded from helping him?

Conceivably such a result might be reached without violating a specific provision of the Constitution; but surely such a result should not be predicated on the intent of Congress that one man should be entitled to a remedy from his state, and that another must be without *any* remedy for an identical wrong. There should not be imputed to Congress an intent contrary to the basic purpose of our government, to give equal justice to all.

A statutory interpretation which would create a no-man's land, an area without government, would not only be contrary to the principle of equal justice for all, but inconsistent with principles of federalism, as indicated in the following summation:

> " 'The constitutional arrangements of these two different nations [Germany and the United States]—originating so far apart in time, brought about under different circumstances but arriving at approximately the same end—indicate a constitutional necessity that there not be left a governmental vacuum from which the legislative power of the component states have been removed, but which the central government has chosen not to fill.' "[1]

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[1]Arthur E. Sutherland "Commerce, Transportation & Customs," in Studies in Federalism, Robert R. Bowe & Carl J. Friedrich, page 316.

IX.

CONSIDERATION OF THE CONSEQUENCES OF EXCLUDING STATES FROM REGULATING INDUSTRIES OUTSIDE THE JURISDICTIONAL STANDARDS OF THE NATIONAL LABOR RELATIONS BOARD INDICATE THAT CONGRESS DID NOT INTEND SUCH EXCLUSION

This court has invalidated state regulation on grounds of Congressional preemption only where there was actual or potential conflict.[1] Although invalidation of state action on grounds of *actual* conflict may be based solely on the facts of the specific case, a determination of *potential* conflict necessitates anticipation of consequences not necessarily present in the case at bar.

Neither the case of *Amalgamated Meat Cutters & Butcher Workmen v. Fairlawn Meats, Inc.*, #41, October Term, 1956, nor *Guss v. Utah Labor Relations Board*, #280, October Term, 1956, involves any *actual* conflict with federal law, either substantively or administratively. It is not suggested that anyone has been deprived of a federally guaranteed right, nor is there any possibility of conflicting administration by the National Labor Relations Board. Argument that Congress has ousted states in this field must rest upon consideration of results that might flow from one or the other interpretation.

It is not to be presumed that any state would act in such a manner, if permitted to regulate, as to deprive citi-

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[1] "The care we took in the **Garner** case to demonstrate the existing conflict between state and federal administrative remedies in that case was, itself, a recognition that if no conflict existed, the state procedure would have survived." **United Workers v. Laburnum Corp.**, (1954) 347 U. S. 656, 665, 74 S. Ct. 833, 98 L. ed. 1025.

zens of federally guaranteed rights.[1] If there should be an overstepping, it could be tested in the same manner as in previous cases where state regulation has been challenged.[2]

Congress' intent to exclude states in the area in which the National Labor Relations Board could, but does not, regulates has not been manifested in the *terms* of the federal statute. Such an intent could be inferred only on the basis of anticipated conflict in administration.

The segment of intrastate enterprise, which it is asserted Congress has removed from the traditional field of state regulation, has been excluded by administrative fiat from the practical application of federal law. Assuming that authority for such action was duly delegated by Congress to the National Labor Relations Board,[3] the definition of the extent of the application of the law becomes as much a part of its substance as if written into it, or as if incorporated through judicial interpretation. The action of the board, which Congress has delegated to act for it, is in effect the action of Congress.

The boundary line may be altered in the future by reason of changing circumstances; but that is a characteristic of *any* legislation or regulation. Every citizen in every

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[1] **Amalgamated Clothing Workers v. Richman Brothers,** (1955) 348 U. S. 511, 99 L. ed. 600, 75 S. Ct. 452;

[2] The following is only a partial list of illustrations: **United Auto, A. & A. I. W. v. Wisconsin Emp. Rel. Bd.,** (1956) 351 U. S. 266, 76 S. Ct. 794; **United Workers v. Laburnum Corp.,** (1954) 347 U. S. 656, 74 S. Ct. 833, 98 L. ed. 1025; **Weber v. Anheuser-Busch, Inc.,** (1955) 348 U. S. 468, 75 S. Ct. 480, 99 L. ed. 546; **Garner v. Teamsters Union,** (1953) 346 U. S. 485, 74 S. Ct. 161, 98 L. ed. 228; **International Union, etc. v. O'Brien,** (1950) 339 U. S. 454, 70 S. Ct. 781, 94 L. ed. 978; **Hill v. Florida,** (1945) 325 U. S. 538, 65 S. Ct. 1373, 89 L. ed. 1782;

[3] The authority to establish general categories for application or non-application of the federal law has been implicitly approved in **N. L. R. B. v. Denver Bldg. & Trades Council,** (1951) 341 U. S. 675, 71 S. Ct. 943, 95 L. ed. 1284.

line of endeavor must face the possibility that the law of tomorrow may not be the same as the law of today.

The existing law, as determined by the specialized agency authorized by Congress to gauge current needs, is that certain categories of intrastate enterprise are excluded from administrative application of the Labor Management Relations Act.

The question is whether Congress has manifested an "unambiguous purpose" that these intrastate enterprises shall also be exempted from state regulation and so placed in a state of practical anarchy.

A mere enumeration of a few of the categories of enterprises which are excluded from regulation under the federal statute demonstrates their tremendous importance to the local welfare.

Local electric and water utilities:

Cascade Natural Gas Corporation, 110 NLRB 947;
So. Wyoming Utilities Co., 110 NLRB 1490.

Rural electrical cooperative associations:

Clay Electrical Coop. Inc., 111 NLRB 175.

Local transportation companies:

Breeding Transfer Co., 110 NLRB 493;
Charleston Transit Co., 111 NLRB 1214;
Safeway Transit Co., 111 NLRB 1359;
Suburban Transit, Inc., 111 NLRB 1251.

Many more could be added to this illustrative list; but examples need not be multiplied to demonstrate the point. A hypothetical case involving a rural electrical cooperative should suffice.

Let us suppose that such a cooperative association declines to bargain with a labor organization representing its employees—a real possibility, because there still remains some unwillingness in unindustrialized rural areas to deal with urban labor representatives. The employees could have no remedy under the federal law. If they are precluded from a remedy under state law they have no recourse but to resort to industrial strife, which it is the avowed purpose of Congress to prevent.

The stoppage of electrical service in rural areas might have slight impact on commerce between the states; but it would have a tremendous impact on local welfare and economy.

The stoppage of such electrical service would mean the shutting off of refrigeration for farms and farm processing plants—resulting not only in economic loss through spoilage, but in health hazards to the urban communities served. The lack of power for milking machines, hatcheries, and processing plants would mean not only economic loss for the producers, but shortages in food supplies in local areas.

Surely Congress did not intend that these areas, so important to local economy and welfare, should be excluded from local, as well as federal, protective regulation.

X.

CESSION UNDER SEC. 10 (a) IS NOT NECESSARY TO ENABLE STATES TO ACT, UNDER RESERVED POWERS, AS TO INDUSTRIES OF WHICH THE NATIONAL LABOR RELATIONS BOARD HAS INDICATED IT WOULD DECLINE JURISDICTION

There is nothing in the language or the legislative history of sec. 10 (a) of the Labor Management Relations Act to manifest an "unambiguous purpose"[1] to forbid state action except upon a specific cession of jurisdiction by the National Labor Relations Board.

The purpose of sec. 10 (a) was assessed by this court in 1949 as "merely to preclude conflict in the *administration* of remedies for the practices proscribed by sec. 8."[2] (Emphasis supplied)

Where there is *no* administration of remedies under federal law, there can be no conflict in administration.

If Congress had intended that there could be no exercise of state jurisdiction in the absence of a specific cession agreement, it could have included language to make that intent clear, after the decision in the *Algoma case, supra,* and in the other decisions recognizing validity of state action without a cession agreement.[3]

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[1] **Algoma Plywood & Veneer Co. v. Wisconsin Employ, R. Board,** (1949) 336 U. S. 301, 69 S. Ct. 584, 93 L. ed. 691;

[2] **Algoma Plywood & Veneer Co., supra.**

[3] **United Auto., A. & A. I. W. v. Wisconsin Emp. Rel. Bd.,** (1956) 351 U. S. 266, 76 S. Ct. 794;

United Workers v. Laburnum Corp., (1954) 347 U. S. 656, 74 S. Ct. 833, 98 L. ed. 1025;

International Union v. Wisconsin E. R. Board, (1949) 336 U. S. 245, 69 S. Ct. 516, 93 L. ed. 651;

Algoma Plywood & Veneer Co. v. Wisconsin Employ. R. Board, (1949) 336 U. S. 301, 69 S. Ct. 584, 93 L. ed. 691.

Congress' failure to make any change, together with other aspects of the legislative history, show that it intended the cession agreement to be necessary only where the National Labor Relations Board has affirmatively asserted jurisdiction by making findings as to the "factual question" whether "conduct of intrastate enterprises does affect that commerce in such a close and intimate fashion as to be subject to federal control."[1] Congressional inaction indicates that it intended sec. 10 (a) to apply only to cases where the use of state facilities is sought primarily as an adjunct of the National Labor Relations Board rather than as independent autonomies under reserved powers.

The following is an excerpt from a well-reasoned analysis of the legislative intent behind sec. 10 (a):[2]

> "* * * At the time the amendments to the Act were being considered there were two ways by which the states took jurisdiction over labor relations affecting commerce. One was through the federal Board's practice of making agreements with state and territorial labor agencies. In those agreements the federal Board ceded jurisdiction to the local agencies not only over cases which it had declined to take but also over many which it normally processed. The most comprehensive agreement was probably the one signed with the Labor Relations Board of Puerto Rico. Under its terms, the federal Board closed its offices in the Island, leaving the insular Board to act as its agent in a very limited field, while ceding to it jurisdiction over all other enterprises which had previously come under national regulation.

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[1] **Consolidated Edison Co. v. National Labor Relations Bd.**, (1938) 305 U. S. 197, 83 L. ed. 126, 59 S. Ct. 206;

[2] Raul Serrano Geyls, "The National Labor Relations Board Jurisdictional Standards: A Problem in Federalism," Volumen XVI, Numero 1, Revista, Del Colegio De Abogados De Puerto Rico.

"The second method used by the states was simply to take over some of the types of cases which the federal Board had declined to consider or those areas in the field of labor relations which they believed were not covered by the federal Act. No agreement with the federal Board was necessary for such purposes. That was the situation which prevailed in nearly forty states where no labor boards were functioning and in some others where arrangements between the states and the federal Board had not been adopted.

"It is clear that Congress must have ben informed of the existence of these two methods. It is significant, therefore, that Section 10 (a) expressly covers outright cession while completely omitting mention of the other. The legislative intent was presumably, therefore, to establish the condition under which the Board could cede to the states authority over those cases which it would normally handle but the transfer of which to the states seemed advisable on policy or administrative consideration. If the intent would have been to regulate both cession and declination, it would have been very easy for Congress expressly to forbid state action unless authorized by Section 10 (a). No such language is to be found in the proviso. The situation calls then for the time-honored rule that 'In construing federal statutes enacted under the power conferred by the Commerce Clause of the Constitution, it should never be held that Congress intends to supersede or suspend the exercise of the reserve powers of the states, even where that may be done, unless, and except so far as, its purpose to do so is clearly manifested.'

"If we turn to the admitted purpose of Section 10 (a)—the uniform application of national labor policy in interstate commerce—again we find no justification for prohibiting state intervention. It is evidence that

if a 'no-man's land' is created in the area abandoned by the federal Board, the congressional policies incorporated in the Taft-Hartley Act will not be put into effect. To find uniformity it would have to be presumed that lack of regulation has become the accepted national policy in that area. Nothing, however, would be more contrary to the congressional intent than a return to the pre-Wagner era in labor relations. Such interpretation would bring back trial by economic combat as the approved method for solving labor-management problems. It would mean that the rights of labor to organize, to bargain collectively and to participate in concerted activities, which Congress and the Board have sedulously defended since 1935, would be deprived of legal protection, while at the same time labor unions would be completely free to engage in the type of activities against employers and individual employees which the Taft-Hartley Act forbids. The essential consideration, however, behind the approval of the Wagner Act, and more particularly, of the Taft-Hartley Act, was a belief that broad government intervention was indispensable to a more equitable and civilized conduct of labor relations. As all states, either through their courts or legislatures, have endeavored to regulate certain aspects of this field, it would seem that such regulation, even if varied, would be more in accordance with the essential purpose of Congress than the 'law of the jungle' which would otherwise prevail."

XI.

CONGRESS INTENDED THAT STATES MIGHT CONTINUE TO EXERCISE RESERVED POWERS, WITH RESPECT TO INTRASTATE INDUSTRIES IN THE CATEGORIES IN WHICH NO FEDERAL REMEDY IS AVAILABLE, WITHOUT FURTHER ACTION OF THE NATIONAL LABOR RELATIONS BOARD AS TO THE SPECIFIC CONTROVERSY

A precisely defined segment of intrastate enterprise has been removed from the scope of federal administrative remedies. It is significant that the action of the National Labor Relations Board does not merely exclude these areas from certain phases of its administration, but that its pronouncement is to the effect that it will not "assert jurisdiction"[1] of industries in such categories.

All that remains to be done to determine whether a specific enterprise lies on one or the other side of the boundary line is a finding of fact based on strictly mathematical calculations. Certainly the objective of the National Labor Relations Board—to remove "purely local"[2] enterprises from its case load so that it can give "adequate attention to more important cases"[3]—can not be effectuated if it must perform a routine mathematical, fact-finding process in thousands of cases in order to establish that it will not assert jurisdiction. The very fact that the National Labor Relations Board prescribed its jurisdictional standards so as to be readily ascertainable, without exercise of discretion, indicates that it did not anticipate having to perform

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[1] Breeding Transfer, 110 NLRB 493, 494;
[2] Breeding Transfer, loc. cit. 110 NLRB 493;
[3] Breeding Transfer, 110 NLRB 493, 497.

any further time-consuming function in order to effectuate its policy.

To require that the National Labor Relations Board must make a specific declination of jurisdiction as to each labor dispute before it, would be to restore the "case-by-case" test rejected in the *Bethlehem Steel* case.[1] Irrespective of the merits of such a test, it would be anomalous to *discard* it in inferring a legislative intent to oust state jurisdiction; and then later—re-adopt it in order also to infer a Congressional intent to oust state jurisdiction—particularly when Congress must have known such a test had long since been rejected. This is particularly significant in the face of the oft-repeated precept that Congress' intent to exclude state action in an intrastate field "is not to be implied unless the legislation fairly interpreted is an actual conflict with the state law."[2]

The test for determination of inclusion and exclusion of industries from its jurisdiction has been deliberately devised by the National Labor Relations Board to enable the parties themselves to know their status without resort to judicial or administrative action. In any case where there might be a disregard of the jurisdictional standards, so as to defeat rights guaranteed by federal law, the usual judicial remedies are available.

Irrespective of where the dividing line is drawn, an enterprise seeking immunity from state or local regulation on grounds of interstate commerce must establish the factual basis on which it claims such immunity. There has never heretofore been any *presumption, without proof*, that

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[1]Bethlehem Steel Co. v. New York State Labor Rel. Bd., (1947) 330 U. S. 767, 67 S. Ct. 1026, 91 L. ed. 1234.

[2]See Townsend v. Yeomans, (1937) 301 U. S. 441, 454, 57 S. Ct. 842, 81 L. ed. 1210.

an enterprise operating wholly within one state was engaged in commerce, or that its operations affected commerce.

Whether the operations of a particular enterprise affect commerce so closely as to remove it from state control is a matter for affirmative proof in each case. See, for instance, *D. A. Schulte, Inc. v. Gangi*, (1946) 328 U. S. 108, 120, 66 S. Ct. 925, 90 L. ed. 1114, where it was said:

> "The burden of proof that rests upon employees to establish that they are engaged in the production of goods for commerce must be met by evidence in the record. * * *"

In *Warren-Bradshaw Drilling Co. v. Hall*, (1942) 317 U. S. 88, 90, 87 L. ed. 83, 63 S. Ct. 125, it was said:

> "The application of the Act depends upon the character of the employees' activities. * * * The burden was therefore upon respondents to prove that, in the course of performing their services for petitioner and without regard to the nature of its business, they were, as its employees, engaged in the production of goods, within the meaning of the Act, and that such production was for interstate commerce. * * *"

In *Maitrejean v. Metcalfe Construction Co.*, (C. C. A. Minn. 1948) 165 F. 2d 571, 574, it was said:

> "It may well be that a timekeeper, a substantial portion of whose time is given to keeping the time of employees engaged in interstate commerce, is entitled to the protection of the Act. * * *. Even so, the burden is upon the employee to show that a substantial portion of his time was devoted to work within the protection of the Act. * * *"

That the federal labor-relations laws are not to be applied, any more than others, without proof as to interstate commerce, is established by *C. I. O. v. McAdory.*[1]

An illustration of an application of the foregoing principle is *Wisconsin E. R. Board v. Gilson Brothers.*[2] In that case, an employer received an adverse decision under state law. After the decision, he tried to assert that the National Labor Relations Act had exempted him from state jurisdiction. He had, however, neglected to offer proof of the nature of his operations; and this court denied certiorari.

The area for state exclusion under the federal act has been determined on the basis of proof that the operations of the enterprise placed it within a category "over which the National Board has consistently exercised jurisdiction,"[3] rather than upon an actual assumption of jurisdiction over the specific industry.

This court has several times indicated that Congressional exclusion under the federal statute is related to the extent of *general* regulation under administrative practice, rather than upon action addressed to the specific case.[4]

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[1] (1945) 325 U. S. 472, 65 S. Ct. 1395, 89 L. ed. 1741;

[2] (1949) 255 Wis. 316, 38 N. W. 2d 483 cert. den. 338 U. S. 891, 70 S. Ct. 240, 94 L. ed. 547;

[3] **La Crosse Telephone Corp. v. Wisconsin Employ. Rel. Bd.,** (1949) 336 U. S. 18, 69 S. Ct. 379, 93 L. ed. 463.

[4] **La Crosse Tel. Corp. v. WERB,** 336 U. S. 25—"the industry is one over which the National Board has consistently exercised jurisdiction." **International Union v. WERB,** 336 U. S. 256—"the facts of the present case do not bring it within the protection of the Act as administered by the Board. We do not find any fixed Board policy to apply the Act to such facts as we have here." **Amalgamated Association v. WERB,** 340 U. S. 391, 392—"No distinction between public utilities and national manufacturing organizations has been drawn in the administration of the Federal Act." **Garner v. Teamsters Union,** 346 U. S. at 488—"Nor is there any suggestion that . . . the federal Board would decline to exercise its powers once its jurisdiction was invoked."

The time element is another practical consideration which indicates that Congress did not intend that the National Labor Relations Board must specifically decline jurisdiction of each labor dispute before such dispute may be deemed a proper subject for state action. One of the purposes of Congressional legislation was to prevent industrial strife. Such prevention requires expeditious, if not immediate, action. The annual reports of the National Labor Relations Board show that the period required for processing contested unfair practice charges averages very nearly a year.[1] If state action must be postponed until after investigation or hearing by an overworked federal agency, the evil to be prevented may well have wrought its harm. The situation might be described in the following words of Phillip Ray Rogers, Member of the National Labor Relations Board:[2]

> "In the first place, I believe that the time consumed in resolving these disputes would be prohibitive. In view of the emergency nature of these cases, time is of the essence, and in view of the involved nature of the Board's procedures, any decision which resulted could be more properly described as an epitaph than a solution."

Without conceding that chaos and confusion would result from a case-by-case test—as is sometimes predicted

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[1]The time for declination of the jurisdiction of the National Labor Relations Board where there is no contest, as in one of the cases at bar, can furnish little guidance. It is the vigorously contested cases which furnish the most fertile field for industrial conflict. In such cases, the records establish that disposition of a specific complaint may run into a period of years instead of months, even where final dismissal does not involve determination on the merits. See, for example, the case of the **Kohler Co.** where the trial examiner's dismissal on technical grounds was not issued for more than two years after the complaint was filed. 38 L. R. R. 503.

[2]Address to Assn. of General Contractors of America, Mar., 1955, 35 L. R. R. 467.

by parties who seek to avoid adverse application of either federal or state law—it may still be confidently asserted that the boundary line between respective federal and state jurisdiction under the yardstick adopted by the National Labor Relations Board offers a realistic opportunity for certainty and stability—providing those on either side of the line have some law to which they can resort.

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Statute involved	2
Question presented	2
Statement	3
Case No. 41	3
Case No. 50	6
Case No. 280	10
Summary of argument	13
Argument	18
A. The touchstones of federal-state jurisdiction	20
B. The extent of federal occupation	23
1. The Wagner Act	23
2. The Bethlehem Steel case	24
3. The Taft-Hartley amendments	27
C. The "conflict" test	41
D. Application of the foregoing principles to the instant case	43
Conclusion	46
Appendix	47–53

CITATIONS

Cases:

Aladdin Industries v. *Associated Transport*, 38 L. R. R. M. 2566 (Tenn. Ct. of App., 1955)	19
Algoma Plywood Co. v. *Wisconsin Employment Relations Board*, 336 U. S. 301	42
Allen-Bradley Local v. *Wisconsin Employment Relations Board*, 315 U. S. 740	23
Amalgamated Association v. *Wisconsin Employment Relations Board*, 340 U. S. 383	29, 32, 33
Amalgamated Clothing Workers v. *Richman Brothers*, 348 U. S. 511	27, 43
Auto Workers v. *Wisconsin Employment Relations Board*, 351 U. S. 266	21, 22
Bethlehem Steel Co. v. *New York State Labor Relations Board*, 330 U. S. 767	14, 15, 19, 24, 25, 26, 27, 28, 30, 35, 36, 37, 38, 41, 42, 43

Cases—Continued

	Page
C. A. Braukman, et al., 94 N. L. R. B. 1609	9
Building Trades Council v. *Kinard Construction Co.*, 346 U. S. 933	19
Breeding Transfer Company, 110 N. L. R. B. 493	28, 38, 39
Building Trades Council v. *Bonito*, 280 P. 2d 295 (Nev. S. Ct. 1955)	19
Charleston R. Co. v. *Varnville Co.*, 237 U. S. 597	25
Denver Building & Constr. Trades Council, 90 N. L. R. B. 1768	46
Dorn's House of Miracles, 91 N. L. R. B. 632	3
Drivers Union v. *Jax Beer Co.*, 36 L. R. R. M. 2188 (Texas Ct. of Civ. App. 1955)	19
Federal Dairy Co., Inc., 91 N. L. R. B. 638	3
Garner v. *Teamsters Union*, 346 U. S. 485	19, 21, 41, 42, 45, 46
Haleston Drug Stores, Inc. v. *National Labor Relations Board*, 187 F. 2d 418, certiorari denied, 342 U. S. 815	3
Hammer v. *Textile Workers*, 111 A. 308, 34 N. J. Super. 34 (1954)	19
Hill v. *Florida*, 325 U. S. 538	32
Hogue & Knott Supermarkets, 110 N. L. R. B. 543	3
Illinois Central R. Co. v. *Public Utilities Commission*, 245 U. S. 493	22
Kelly v. *Washington*, 302 U. S. 1	20, 21
Medford Bldg. & Constr. Trades Council, 96 N. L. R. B. 165	46
Mine Workers v. *Arkansas Oak Flooring Co.*, 351 U. S. 62	22, 34, 41, 44, 45
Minnesota Rate Cases, 230 U. S. 352	20
National Labor Relations Board v. *Denver Bldg. & Constr. Trades Council*, 341 U. S. 675	3
National Labor Relations Board v. *Fainblatt*, 306 U. S. 601	23
New York Board v. *Wags Transportation System*, 130 N. Y. S. 2d 731, affirmed on other grounds, 284 App. Div. 883, 134 N. Y. S. 2d 603 (1955)	20
Optical Workers v. *National Labor Relations Board*, 227 F. 2d 687, rehearing denied, 229 F. 2d 170, certiorari denied 351 U. S. 963	3
Raisch Motors, 35 L. R. R. M. 1631 (N. Y. S. L. R. B., 1955)	20
Retail Clerks v. *Your Food Stores*, 225 F. 2d 659	20, 43

Cases—Continued Page

Rice v. *Santa Fe Elevator Corp.*, 331 U. S. 218 36
School District v. *Trades Council*, 37 L. R. R. M. 2232 (Mich. Cir. Ct., 1955) 20
Teamsters Union v. *New York, N. H. & H. R. Co.*, 350 U. S. 155 21
United Auto Workers v. *O'Brien*, 339 U. S. 454 32
United Construction Workers v. *Laburnum Corp.*, 347 U. S. 656 ..... 22, 36, 41, 42
United Electrical, Radio & Machine Workers v. *Worthington Corp.*, 38 L. R. R. M. 2507 42
United Mine Workers v. *Arkansas Oak Flooring Co.*, 351 U. S. 62 ..... 17, 21, 32
Universal Car Co. v. *I. A. M.*, 35 L. R. R. M. 2087 (Mich. Cir. Ct., 1954) 20
Weber v. *Anheuser-Busch, Inc.*, 348 U. S. 468 ..... 13, 21, 22, 34, 42, 45
Welch Co. v. *New Hampshire*, 306 U. S. 79 32

Statutes:

Labor-Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C. 141, *et seq.*), Section 1 (b) 21, 47
National Labor Relations Act, 1935, 49 Stat. 449:
Section 1 40
Section 7 31
Section 8 31
Section 10 (a) 14, 23
Section 10 (b) 23
National Labor Relations Act, as amended (61 Stat. 136, 65 Stat. 601, 29 U. S. C. 151, *et seq.*):
Section 1 ..... 30, 40, 47
Section 2 47
Section 2 (2) 30
Section 2 (3) 30
Section 2 (6) 23, 48
Section 2 (7) 23, 48
Section 7 48
Section 8 22
Section 8 (a) (1) 11, 48
Section 8 (a) (3) 7, 11, 48
Section 8 (a) (5) 11, 50
Section 8 (b) 31
Section 8 (b) (2) 46, 50

Statutes—Continued Page

National Labor Relations Act, as amended—Con.

Section 8 (d) 30
Section 9 ..... 22, 23, 44, 45
Section 9 (f) 33
Section 9 (g) 33
Section 9 (h) 33
Section 10 22
Section 10 (a) 15, 17, 18, 23, 28, 29, 36, 37, 40, 51
Section 10 (b) 28, 52
Section 14 (a) 30, 53
Section 14 (b) 30
Section 202 (c) 30
Section 203 (b) 30

Miscellaneous:

Hearings Before the Senate Committee on Expenditures In The Executive Departments on S. Res. 248, 81st Cong., 2d Sess., 40 28
Hearings Before the Senate Committee on Labor and Public Welfare on S. 249, Part 1, 81st Cong., 1st Sess., 175–176 28
Report of the Joint Committee on Labor Management Relations, S. Rept. 986, Part 3, 80th Cong., 2d Sess., 11–13 ..... 28, 38
H. Rep. 1852, 81st Cong., 2d Sess., 10 28
N. L. R. B., Nineteenth Annual Report (G. P. O., 1955) 8, 38
S. Rep. 99, 81st Cong., 1st Sess., 40 28

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 41

AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, LOCAL NO. 427, AFL, ET AL., PETITIONERS

v.

FAIRLAWN MEATS, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

No. 50

SAN DIEGO BUILDING TRADES COUNCIL, ET AL., PETITIONERS

v.

GARMON, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. 280

P. S. GUSS, D/B/A PHOTO SOUND PRODUCTS MANUFACTURING COMPANY, APPELLANT

v.

UTAH LABOR RELATIONS BOARD

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD AS AMICUS CURIAE

OPINIONS BELOW

Case No. 41: The opinion of the Supreme Court of Ohio (R. 172)[1] is reported at 164 Ohio St. 285, 130

[1] The "R" references are to the records in the respective cases.

N. E. 2d 237. The opinions of the Court of Appeals (R. 158–166) and of the Court of Common Pleas (R. 148–156) are unreported.

Case No. 50: The opinion of the Supreme Court of California (R. 43–64) is reported at 45 Cal. 2d 657, 291 P. 2d 1. The opinion of the Fourth District Court of Appeals (R. 30–42) is not officially reported but may be found in 127 A. C. A. 320.

Case No. 280: The opinion of the Supreme Court of Utah (R. 24–33) is reported at 5 Utah 2d 68, 296 P. 2d 733.

JURISDICTION

The petitions for writ of certiorari in Nos. 41 and 50 were granted on May 7, 1956 (No. 41, R. 189; No. 50, R. 64–65). On October 8, 1956, this Court noted probable jurisdiction in No. 280 (R. 36). The jurisdiction of this Court derives from 28 U. S. C. 1257.

STATUTE INVOLVED

The pertinent provisions of the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C. 141, *et seq.*), are set forth in the Appendix, *infra*, pp. 47–53.

QUESTION PRESENTED

The interest of the National Labor Relations Board as *amicus curiae*[1] is limited to the single question common to the three cases, namely, whether Congress by vesting in the National Labor Relations Board jurisdiction over certain labor relations matters affecting interstate commerce has completely displaced state power to deal with such matters in situations where

[1] The Court invited the Solicitor General to file briefs in these cases setting forth the views of the Board.

the Board properly declines or obviously would decline to exercise its jurisdiction.

STATEMENT

Case No. 41

Fairlawn Meats, Inc., herein called Fairlawn, is an Ohio corporation and operates three meat markets in the vicinity of Akron, Ohio (R. 158; 45–46). All of its sales are intra-state (R. 161; 86). However, out of annual purchases totaling approximately $900,000 in value, about $100,000 worth comes from outside Ohio directly, and about $200,000 worth from outside Ohio indirectly (R. 161; 50, 65–66). These interstate purchases concededly fall below both the 1950 and the current 1954 minima prescribed by the Board as a prerequisite for the assertion of its jurisdiction over retail stores.[2]

[2] Settled law establishes the Board's authority to husband its limited resources by curtailing its assertion of jurisdiction in cases coming before it. *Haleston Drug Stores, Inc.* v. *National Labor Relations Board*, 187 F. 2d 418 (C. A. 9), certiorari denied, 342 U. S. 815; *Optical Workers* v. *National Labor Relations Board*, 227 F. 2d 687 (C. A. 5), rehearing denied, 229 F. 2d 170, certiorari denied, 351 U. S. 963; and see *National Labor Relations Board* v. *Denver Bldg. & Constr. Trades Council*, 341 U. S. 675, 684. Pursuant to this authority, the Board in 1950 determined to withhold its assertion of jurisdiction over enterprises whose interstate operations consisted merely of inflow of goods across state lines unless such enterprises received directly from out-of-state material valued at $500,000 a year, or indirectly $1,000,000 a year. *Federal Dairy Co., Inc.*, 91 N. L. R. B. 638, 639; *Dorn's House of Miracles*, 91 N. L. R. B. 632, 633. In 1954, the Board revised these requirements with respect to intrastate retail stores so as to make the jurisdictional minima $1,000,000 and $2,000,000 respectively. *Hogue & Knott Supermarkets*, 110 N. L. R. B. 543, 544. The validity of these standards is not challenged here.

Petitioners, herein called the Meat Cutters, after an unsuccessful effort to enlist the support of a majority of Fairlawn's approximately 50 employees,[4] asked Fairlawn for exclusive recognition and a union-security agreement requiring that all employees after an appropriate waiting period become union members as a condition of their employment (R. 159; 16–17, 176). When Fairlawn refused to enter into such an agreement, the Meat Cutters picketed Fairlawn's stores in support of its demand and engaged in some secondary pressure on Fairlawn's suppliers (R. 159; 24, 26–28, 115–116).

To counter the union's action, Fairlawn sought both a temporary and a permanent injunction in the Court of Common Pleas for Summit County, Ohio (R. 1–4). The Meatcutters at first sought to remove the case to the federal district court and obtain its dismissal on the ground, *inter alia,* that the subject matter of the action had been preempted by Congress in the National Labor Relations Act, thereby leaving the state court without authority to entertain the action or to grant any of the relief requested (R. 27, 28). When this effort failed because the prerequisites for removal of jurisdiction were found lacking, the Meatcutters pressed virtually the same claim before the Court of Common Pleas, urging that the National

[4] The Union claims here as in the court below that it had achieved majority status among Fairlawn's employees but that its majority had been dissipated by Fairlawn's unfair labor practices. The state court (R. 159; 126) found, however, that the Union never commanded the adherence of more than 18 of Fairlawn's 50 employees.

Labor Relations Board had exclusive jurisdiction to hear and determine the matters complained of (R. 8).[5] The Court of Common Pleas rejected the union's defense. Noting that the volume of Fairlawn's interstate imports concededly fell below the minimum amount set forth in the Board's applicable standard governing its assertion of jurisdiction in cases of this kind (*supra*, n. 3), the court held that "if the Board originally had jurisdiction, it has ceded that to the state court" (R. 150). On the merits, the court found that the picketing, though peaceful, was for an unlawful purpose since it sought to obtain a union-security agreement at a time when the Meatcutters did not represent a majority, that there was no labor dispute, and that there was probative evidence of a secondary boycott by the Meatcutters against Fairlawn's suppliers (R. 153–156). Upon these findings, the Court of Common Pleas enjoined the Meatcutters from engaging in picketing Fairlawn, from trespassing upon Fairlawn's premises,[6] and from exerting secondary pressure on Fairlawn's suppliers (R. 156–157).

On appeal, the Ohio Court of Appeals, hearing the case *de novo* on the same pleadings filed in the trial court, found it unnecessary to discuss the Board's jurisdictional yardsticks. In its view, Fairlawn's busi-

[5] None of the parties sought relief before the Board.

[6] Before the state courts, Fairlawn urged, *inter alia*, that the picketing was enjoinable as a trespass because, at two of the stores, the picketing took place on its property. The place where the picketing occurred in these instances was in front of Fairlawn's stores in an area similar to the areas usually found in front of suburban shopping centers, privately owned but open to the public for purposes of access.

ness "was purely of a local character," its interstate purchases, both direct and indirect, were not substantial, and hence interstate commerce was not burdened or obstructed (R. 160–161). On the merits, the Court of Appeals agreed with the trial court and entered an injunction identical to that entered below (R. 167–168).

A further appeal by the Meatcutters to the Supreme Court of Ohio was dismissed "for the reason that no debatable constitutional issue is involved" (R. 172).

Case No. 50

J. S. Garmon, J. M. Garmon, and W. A. Garmon, herein collectively called Garmon, constitute a partnership doing business as the Valley Lumber Company and operate two lumber yards in the County of San Diego, California, where they sell lumber and building materials at retail (R. 44; 82). In the course of the partnership operation, Garmon annually purchases for resale approximately $250,000 worth of material which originates outside of California (R. 44; 83).

Garmon's employees are not members of petitioners, herein collectively designated as the Union, and the Union has not been certified, designated, or recognized as bargaining representative of the employees (R. 44; 83, 121, 122–123). Nevertheless, on or about November 15, 1952, the Union demanded that Garmon enter into a labor agreement requiring, *inter alia,* that its employees after an appropriate waiting period become and remain members in good standing of the Union as a condition of their employment (R. 44;

2, 9, 83–86). Garmon refused to sign such an agreement unless and until a majority of the employees designated the Union as their bargaining representative (R. 14; 83–87). Thereupon, the Union engaged in peaceful picketing to enforce its demand for execution of the agreement (R. 45; 87). In addition to picketing, Union agents followed Garmon's trucks and threatened persons doing business with Garmon with economic injury (R. 45; 88–89, 124, 180).

About a week after the picketing began, Garmon, on May 7, 1953, filed suit in the Superior Court for San Diego, California, to enjoin the Union from picketing and for damages, alleging that it was in interstate commerce and that the contract sought by the Union would violate the National Labor Relations Act (R. 1–5). The Union contested the court's jurisdiction, claiming that the National Labor Relations Board had exclusive jurisdiction and that Garmon had not exhausted its administrative remedies under the federal Act (R. 5–12). On the same day the state action was instituted, Garmon filed a representation petition with the Board's regional office asking that the question of representation of its employees be resolved (R. 45; 191, 196). The Board's Regional Director, pursuant to the Board's announced policy of declining jurisdiction in cases having an insubstantial impact on the national economy, dis-

[7] Section 8 (a) (3) of the federal Act prescribes as a precondition for a valid union-security agreement that the labor organization entering into the agreement be the statutory bargaining representative of the employees in the appropriate unit covered by the agreement when made.

missed the petition.* No appeal was taken from the Regional Director's dismissal and no unfair labor practice charges were filed by any of the parties.

On July 30, 1953, the Superior Court after hearing issued its findings of fact and conclusions of law (R. 12–17). Briefly, the court found that Garmon's business affected interstate commerce but that the National Labor Relations Board had declined, pursuant to its jurisdictional policy, to entertain a proceeding to determine the proper bargaining representative, if any, of Garmon's employees. The court found further that the Union had engaged in picketing and other conduct for the purpose of compelling Garmon to enter into a union-security agreement requiring Union membership as a condition of employment notwithstanding that the Union had not been certified, designated, or recognized as bargaining representative of Garmon's employees. The court concluded that such conduct on the part of the Union was for an improper purpose in that it would compel Garmon to commit a violation of the National Labor Rela-

* Petitioners do not challenge the Board's settled authority to limit its assertion of jurisdiction in representation or unfair labor practice cases brought before it. See n. 3, *supra*. Pursuant to this authority, the Board has determined to withhold its assertion of jurisdiction over non-retail enterprises whose interstate operations consist merely of inflow of goods across state lines unless such enterprises receive directly from out-of-state goods or materials valued at $500,000 or more, or indirectly $1,000,000 or more. For retail establishments, other than multi-state retail chains, the jurisdictional minima are $1,000,000 and $2,000,000 respectively. *Nineteenth Annual Report of the National Labor Relations Board* (Gov't Pr. Off., 1955), pp. 2, 4. Petitioners' interstate purchases concededly fall below these jurisdictional standards.

tions Act. Accordingly, the court enjoined the Union from picketing or from engaging in secondary pressure to compel the exclusion of a union-security agreement unless and until the Union was properly designated as bargaining representative of Garmon's employees. The court also assessed damages against the Union in the sum of $1,000.00.

On appeal by the Union, the District Court of Appeals for the Fourth District of California reversed (R. 30–42). It held that the National Labor Relations Board had exclusive jurisdiction, that Garmon had not exhausted its administrative remedy (no unfair labor practice charge was filed with the Board), and that the Union's conduct was not unlawful under California law.

Garmon then appealed to the California Supreme Court. That court held, four to three, that where the Board declines to assert jurisdiction because of its jurisdictional yardsticks,* such action amounts to a declaration that the national labor policy will not be jeopardized if the State assumes jurisdiction (R. 48). Reasoning that the cession proviso of Section 10 (a) of the federal Act applies only to cases over which the Board normally asserts jurisdiction, that no conflict arises where the Board refuses to act, and that federal preemption in such cases would enable a party to a labor dispute to flout the national policy, the majority concluded that "the legislative purpose

*The Supreme Court of California correctly observed (R. 49) that the Board does not differentiate between representation cases and unfair labor practice cases in the application of its jurisdictional yardsticks. *C. A. Braukman, et al.*, 94 N. L. R. B. 1609, 1611.

must have been to give the state courts jurisdiction when the board specifically determines that the controversy will not affect the national economy" (R. 48–50). Accordingly, the majority concluded that the state could properly assert jurisdiction.

On the merits, the majority applied California law that "the object of concerted labor activities must be proper and that it must be sought by lawful means, otherwise the persons injured may obtain damages or injunctive relief" (R. 50–51). Since, according to the court, the Union's activities here were for a purpose unlawful under the federal statute, they were not privileged under California law and the Superior Court's judgment was affirmed both with respect to the injunction and with respect to the award of damages (R. 50–53).

Case No. 280

Appellant, P. S. Guss, doing business as Photo Sound Products Manufacturing Company in Salt Lake City, Utah, manufactures specialized photographic equipment for the United States Air Force on a contract basis (R. 24; 11, 12). In order to carry out his contractual commitments, Guss purchased materials from outside the state in an amount "a little under $50,000" (R. 24; 13). The finished products were shipped to Air Force bases in Utah and to Air Force bases outside of Utah (R. 24; 11–12).

Shortly after Guss began his manufacturing operation, United Steelworkers of America, CIO, herein called Steelworkers, began an organizational campaign. In December, 1953, Steelworkers filed with the National Labor Relations Board a petition for certification as

bargaining representative of the employees (R. 25; 1, 10). Pursuant to that petition, Guss and Steelworkers entered into an agreement for a consent election to be conducted by the National Board, the agreement reciting, *inter alia*, that the employer, Guss, was "engaged in commerce within the meaning of Section 2 (6), (7) of the National Labor Relations Act" (*ibid.*). Steelworkers prevailed in the election and on May 4, 1954, was duly certified as bargaining representative of appellant's employees (R. 25; 1).

Shortly thereafter, Steelworkers filed with the National Board unfair labor practice charges alleging that Guss had violated Section 8 (a) (1), (3), and (5) of the National Labor Relations Act (R. 25, 2–3). While these charges were being investigated, the Board promulgated revised standards to govern its assertion of jurisdiction in cases coming before it.[10] Upon application of these standards, the General Counsel concluded that further proceedings with respect to the Steelworkers' charges were not warranted "inasmuch as the operations of the company involved are predominantly local in character and it does not appear that it would effectuate the policy of the Act to exercise jurisdiction" (R. 25; 4). Accordingly, on July 21, 1954, the General Counsel declined to issue a complaint and dismissed the charges (*ibid.*).

Nine days later, Steelworkers filed virtually identical charges with the Utah Labor Relations Board (R. 25; 5–6). Throughout the subsequent proceedings based on those charges, Guss urged that the Utah Board was without authority to entertain the matter

[10] See notes 3, 8, *supra*.

derived from such relevant manifestations of Congressional purpose as are available. Settled canons of statutory construction and due regard for our federal system, however, suggest that any doubt on this score be resolved in favor of permitting the States to act, so long as such action is not in conflict with the federal law.

B. The National Labor Relations Act, as to matters covered by it, vests in the Board a potential jurisdiction as broad as the reach of the Commerce Clause. But the Board was not required even under the Wagner Act to assert the full measure of its statutory jurisdiction. Section 10 (a) of that Act merely "empowered," it did not "direct," the Board to prevent unfair labor practices. As a matter of fact, budgetary limitations then, as now, precluded the Board from exhausting its statutory jurisdiction. As the States developed their own labor relations machinery to deal with representation and unfair labor practice matters, problems inevitably arose as to the existence of state power in those areas where the Board, though having jurisdiction, declined to exercise it.

Such a problem arose in the *Bethlehem Steel* case, 330 U. S. 767, where this Court struck down a state certification of a bargaining unit of foremen notwithstanding that the federal Board was declining jurisdiction over petitions for such certifications and notwithstanding that the federal Board had entered into an agreement, albeit without statutory authorization, ceding a portion of its jurisdiction to the state. Six Justices held that the federal Board had not ceded jurisdiction over the subject matter of the

particular case, *i. e.*, certification of foremen's bargaining units, and that the federal Board's declination of jurisdiction in these cases was tantamount to a declaration of federal policy that foremen's bargaining units were inappropriate. Accordingly, they reserved decision as to the existence of state power where the Board declines jurisdiction not for reasons of policy but "for budgetary or other reasons." Three Justices, while agreeing with the final result, questioned the implication which they found in the principal opinion that, while a state might assert jurisdiction where the federal Board "for budgetary or other reasons" declined to act, the Board might not be able to give such power to the States by agreement. In their view, such a principle would "leave uncontrolled large areas of industrial conflict", and hence a construction of the Act invalidating such an agreement procedure was not warranted.

Congress, in drafting the 1947 amendments to the Act, was specifically aware of the *Bethlehem Steel* decision, and the amendments so far as here relevant reflect that awareness. Thus, Congress left unchanged both the broad statutory jurisdiction which it had accorded to the Board in the original Act, and left unchanged also the broad discretion of the Board to decline "for budgetary or other reasons" to assert its jurisdiction. It did, however, deal with the question which was in apparent dispute in *Bethlehem Steel,* namely, the power of cession by agreement. Congress fashioned a proviso to Section 10 (a) which empowered the Board to cede jurisdiction by agreement to state authority where state law was not in-

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consistent with the corresponding provision of federal law.

The advocates of complete federal preemption rely on this proviso to establish that the Taft-Hartley Act wholly displaces state power in the area covered by the Act. In brief, they argue that federal labor policy is paramount in the field of labor relations affecting interstate commerce, that the cession proviso was designed to insure uniformity of treatment even where States were permitted to act, that Congress has dictated a method by which States could obtain jurisdiction in this area, and that, therefore, all other methods were inferentially excluded. The fact that this construction gives rise to a "no-man's land," where neither federal nor state authority is operative, is in their view an unfortunate consequence which flows from the text and structure of the Act.

The argument, we believe, has many serious flaws. It confuses two separate functions of the Act. The first function of the Act is to prescribe the legitimate rights of both employers and employees in their rights affecting commerce. These rights are binding upon all tribunals, state as well as federal, dealing with controversies involving such rights. The second function is to establish an administrative agency, the National Labor Relations Board, to supervise and enforce certain labor relations matters, *i. e.*, representation questions and unfair labor practice matters, set forth in the Act. The distinction between the broad substantive rights prescribed in the Act and the limited function of the Board in administering certain of these rights is underscored by this Court's decision in

United Mine Workers v. *Arkansas Oak Flooring Co.*, 351 U. S. 62. It does not follow, merely because the Act requires that the rights set forth in the Act be respected by both federal and state tribunals throughout the entire field reached by the federal commerce power, that Congress in creating the Board to administer certain of those rights intended to exclude the States from that area altogether except as prescribed in the cession proviso. Congress entrusted the administration of the Act to the Board and left to the Board also the determination as to the extent to which federal power should be applied in this field. Therefore, a residual state power remains operative in the area to which the Board, as the agency of Congress, has seen fit not to extend the federal power.

Petitioners claim that this interpretation in effect writes the Section 10 (a) proviso out of the Act, since the Board can, merely by declining jurisdiction, permit the States to act in cases where it would be unable to cede jurisdiction under the conditions prescribed in the proviso. The proviso, however, was not intended to deal with the situation where the Board declines, as here, to assert jurisdiction for budgetary or other administrative reasons. As we read the legislative history, the proviso was intended to [illegible] the Board authority, which *Bethlehem* [illegible] put in doubt, to enlist the aid of state agencies [illegible] as a matter of deliberate judgment it concludes that due regard for local interests make such a course desirable and appropriate. The Board's jurisdictional "yardsticks" are not influenced by this consideration at all

but are prompted by the need for utilizing its limited resources in a manner best calculated to effectuate the policies of the Act in cases having the most direct impact on the national economy. Examination of those "yardsticks" reveals that within those limitations there is adequate scope for the operation of the Section 10 (a) proviso. The Section 10 (a) proviso, therefore, can be given its natural reading, namely, to supply the statutory authority, theretofore lacking, for the Board to cede jurisdiction to the states by agreement over cases it would otherwise handle.

C. Whether the existence of state power in this field is tested by the criterion of federal occupation of the field or by the criterion of conflict, the result is the same. Where the Board, pursuant to the discretion vested in it by the Act, determines that the effectuation of federal policy does not require the application of federal power, assertion of state power neither gives rise nor can give rise to conflict which normally results in the exclusion of state regulation. The friction, confusion, and uncertainty arising from the application of dual controls are nonexistent because the federal Board does not exercise nor assert control. To forbid state control also in such a context would mean that Congress intended to create a "no-man's land" wholly unregulated. Such a purpose cannot reasonably be attributed to Congress.

ARGUMENT

The common question presented in these three cases is whether Congress, by vesting in the National Labor Relations Board jurisdiction over certain labor rela-

tions matters affecting interstate commerce, displaced state power even in cases where, as here, the Board properly declines or obviously would decline to assert jurisdiction. This Court reserved that question in express terms in *Building Trades Council* v. *Kinard Construction Co.*, 346 U. S. 933. See also *Garner* v. *Teamsters Union*, 346 U. S. 485, 488, and *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U. S. 767, 776. Petitioners in Nos. 41 and 50 and appellant in No. 280 argue that Congress in the National Labor Relations Act, asserting its paramount power under the Commerce Clause, intended that state power be superseded even where the Board properly declines to assert the full measure of its statutory jurisdiction, thereby giving rise to a jurisdictional "no-man's land." Respondents in Nos. 41 and 50 and appellee in No. 280 challenge this conclusion. In their view, the scheme of the Act and the nature of our federal system compel the conclusion that, where the Board declines to assert jurisdiction, the reserved powers of the States are operative. The respective parties find support in state and federal court decisions which by their contrariety evince the strength of the competing considerations and the lack of explicit and authoritative guidance from Congress.[12]

The Board fully appreciates the merits and shortcomings of the respective positions. However, on bal-

[12] For examples of cases upholding state power where the Board declines jurisdiction, see, in addition to the instant cases, *Aladdin Industries* v. *Associated Transport*, 38 L. R. R. M. 2566 (Tenn. Ct. of App., 1955); *Building Trades Council* v. *Bonito*, 280 P. 2d 295 (Nev. S. Ct. 1955); *Hammer* v. *Textile Workers*, 111 A. 308, 34 N. J. Super. 34 (1954); *Drivers Union* v. *Jax Beer Co.*, 36 L. R. R. M. 2188 (Texas Ct. of Civ. App., 1955); *School District* v. *Trades Council*, 37 L. R. R. M.

ance, the Board believes that Congress did not intend to leave the States wholly without power to act in cases where the Board declines to assert jurisdiction, but rather that the States may act, so long as their action is compatible with federal law.[13] More particularly, the Board believes that so far as the instant cases are concerned, the States of Ohio, California, and Utah properly asserted jurisdiction.

A. THE TOUCHSTONES OF FEDERAL-STATE JURISDICTION

At the outset, we think it appropriate to review briefly the basic touchstones of federal and state jurisdiction in this field. Congress derives its power to regulate labor relations matters affecting interstate commerce from the Commerce Clause of the Constitution. If Congress does not exercise that power, States retain their inherent right to exercise whatever power is appropriate to their territorial jurisdiction even though interstate commerce may be affected. *Kelly* v. *Washington,* 302 U. S. 1, 9–10; *The Minnesota Rate Cases,* 230 U. S. 352, 402. On the

2232 (Mich. Cir. Ct., 1955); *Raisch Motors*, 35 L. R. R. M. 1631 (N. Y. S. L. R. B., 1955).

For examples of cases holding to the contrary, see *Retail Clerks* v. *Your Food Stores*, 225 F. 2d 659 (C. A. 10, 1955); *N. Y. Board* v. *Wags Transportation System*, 130 N. Y. S. 2d 731 ~~741~~, affirmed on other grounds, 284 App. Div. 883, 134 N. Y. S. 2d 603 (1954); *Universal Car Co.* v. *I. A. M.*, 35 L. R. R. M. 2087 (Mich. Cir. Ct., 1954).

[13] In referring to the position of the Board on the difficult questions presented by these cases, we do not mean to imply that the Board is unanimous. The position taken in this brief is supported by a majority of the Board. Minority views within the Board are, on the one hand, that state power is wholly superseded within the area occupied by the Federal Act; and, on the other hand, that in the area where the Board declines jurisdiction, the states are wholly free to act without being subject to any limitations drawn from the Act.

other hand, if Congress elects pursuant to its commerce power to occupy the field, "its control by the Supremacy Clause supersedes or, in the current phrase, pre-empts state power." *Auto Workers* v. *Wisconsin Employment Relations Board,* 351 U. S. 266, 271.

Congress, however, need not occupy the whole field. Its power under the Commerce Clause is permissive, not compulsory. It may circumscribe its regulation and occupy only a limited field. "When it does so, state regulation outside that limited field and otherwise admissible is not forbidden or displaced." *Kelly* v. *Washington,* 302 U. S. at 10.

It is well settled that the National Labor Relations Act falls in this middle ground. Congress did not by that Act "exhaust the full sweep of legislative power over industrial relations given by the Commerce Clause." *Weber* v. *Anheuser-Busch, Inc.,* 348 U. S. 468, 480. It left much to the States, "though Congress has refrained from telling us how much." *Garner* v. *Teamsters Union,* 346 U. S. 485, 488.

Prior litigation in this Court has clarified to an appreciable extent the respective areas of federal and state jurisdiction in this field. The net of this litigation is summarized in the *Anheuser-Busch* opinion and will not here be recapitulated in detail.[14] We are con-

[14] We do not overlook the several decisions in this field which this Court has issued since *Anheuser-Busch.* See especially *Teamsters Union* v. *New York, N. H. & H. R. Co.,* 350 U. S. 155; *United Mine Workers* v. *Arkansas Oak Flooring Co.,* 351 U. S. 62; *Auto Workers* v. *Wisconsin Employment Relations Board,* 351 U. S. 266. While these decisions clarify further the respective areas allocated to state and federal authority in the field of labor relations affecting interstate commerce, they

cerned here only with the category of cases with which the Board is specifically empowered to deal by Section 9 (the representation provisions) and Sections 8 and 10 (the unfair labor practice provisions) of the Act. In such cases, it is settled law that, subject to exceptions not relevant here,[18] if the Board elects to assert jurisdiction, state power is displaced.

It does not necessarily follow, however, that state power would likewise be displaced in this area in cases where the Board, for budgetary or other administrative reasons, declines, or obviously would decline, to assert jurisdiction. Here, too, the extent of federal occupation is the touchstone by which residual state power must be gauged and the extent of that occupation was for Congress to determine.

Needless to say, any doubt in this regard must, on settled canons of statutory construction, be resolved in favor of permitting the States to act, so long as such action is not in conflict with federal law and respects rights guaranteed by the Act. As this Court said in *Illinois Central R. Co.* v. *Public Utilities Commission*, 245 U. S. 493, 510, quoted with approval in *Welch Co.* v. *New Hampshire*, 306 U. S. 79, 85: "In

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do not, so far as material here, alter the basic scheme outlined in the *Anheuser-Busch* opinion. The *Arkansas-Oak Flooring* case is discussed, *infra*, pp. 32–34, 44–45.

[18] Such exceptions arise, for example, with respect to the mass picketing type of situation presented in *Auto Workers* v. *Wisconsin Employment Relations Board*, 351 U. S. 266, and with respect to state court damage suits in the kind of situation presented in *United Construction Workers* v. *Laburnum Corp.*, 347 U. S. 656. In such situations, state action is not wholly precluded even though the federal Board asserts or would assert jurisdiction pursuant to the provisions of the Act.

construing federal statutes enacted under the power conferred by the commerce clause of the Constitution * * * it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a State, even when that may be done, unless, and except so far as, its purpose to do so is clearly manifested." See also *Allen-Bradley Local* v. *Wisconsin Employment Relations Board,* 315 U. S. 740, 749.

B. THE EXTENT OF FEDERAL OCCUPATION

It seems fair to say that, so far as the question here at issue is concerned, Congress has not either in the original or in the amended Act "clearly manifested" its purpose. But even applying less stringent criteria, we believe logic and authority militate against the view that state authority is wholly displaced. We turn to the relevant statutory provisions.

1. THE WAGNER ACT

Congress in the National Labor Relations Act of 1935, with respect to matters covered by the Act, vested in the Board a potential jurisdiction as broad as the reach of the Commerce Clause. Sections 2 (6), 2 (7), 9, and 10 of the Act. *National Labor Relations Board* v. *Fainblatt,* 306 U. S. 601, 607. On the other hand, the Board was not required to assert the full measure of its statutory jurisdiction. Section 10 (a) of the Wagner Act merely "empowered," it did not "direct," the Board to prevent unfair labor practices, and Section 10 (b) of that Act granted the "power" instead of imposing the "duty" to issue a complaint upon the filing of charges.

As a matter of fact, the Board did not, even under the Wagner Act with its more limited unfair labor practice coverage, assert jurisdiction over all cases falling within its statutory ambit. Budgetary limitations and other administrative considerations then, as now, precluded exhaustion of its statutory jurisdiction. It was foreseeable, therefore, that as the States developed their own labor relations machinery to deal with representation and unfair labor practice matters problems would arise concerning the existence of state power in those areas where the Board, though having jurisdiction, declined to exercise it.

2. THE BETHLEHEM STEEL CASE

Such a problem arose in this Court for the first time in *Bethlehem Steel* v. *New York State Labor Relations Board*, 330 U. S. 767, decided in April, 1947, during the very period when Congress was debating the proposed Taft-Hartley amendments. In that case, a group of foremen employed in an enterprise affecting interstate commerce had applied for certification to the New York State Labor Relations Board. At the time of this application, the federal Board was following the practice, subsequently changed, of denying for reasons of policy, but without renouncing jurisdiction, petitions for certification of foremen's units. This Court held that the federal Act nonetheless precluded the State from regulating the organizational rights of foremen. In so holding, the Court treated the federal Board's practice of denying foremen's petitions as tantamount to a policy determination by the federal agency that foremen's

bargaining units were inappropriate. In the Court's view, therefore, this was not a case "where federal power has been delegated but lies dormant and unexercised" but one where federal power had been exercised and state power was superseded (330 U. S. at 774–775).[16]

At this point, nothing more was involved than routine application of familiar principles of federal-state jurisdiction in the area of interstate commerce. New York argued, however, that the *Bethlehem* case was different because the Board could by agreement cede to the States, and with respect to New York had ceded, jurisdiction over local industries.[17] The Court, while characterizing this procedure as a "commendable effort to avoid conflict in this overlapping state of the statutes," pointed out that nothing in the agreement with New York affected disposition of the case before it since the federal Board had "made no concession or delegation of power to deal with this subject." 330 U. S. at 776. The Court added, however, that "The election of the National Board to

[16] The Court made it clear that the same result would follow even if, as later occurred, the federal Board supported the right of foremen to be certified so that the federal and state boards would be following the same policy. "When Congress has taken the particular subject matter in hand coincidence is as ineffective as opposition * * *." 330 U. S. at 775–776, quoting from *Charleston R. Co.* v. *Varnville Co.*, 237 U. S. 597, 604.

[17] The Wagner Act did not contain a provision specifically providing for such cession agreements. Congress, as we show later, remedied this omission in the Taft-Hartley Act. For a discussion of the Board's practice under the Wagner Act with respect to cession agreements and the reason for such agreements, see the separate opinion in *Bethlehem Steel*, *supra*, 330 U. S. at 782–784.

decline jurisdiction in certain types of cases, *for budgetary or other reasons* presents a different problem which we do not now decide." [Emphasis added.]

This reservation prompted three Justices to join in a separate opinion. They agreed that where, as in *Bethlehem,* the Board had taken the subject matter in hand and made a policy determination with respect thereto, state power respecting that subject matter was superseded. They disagreed, however, with the implication which they read in the principal opinion that while a state *might* be able to assert jurisdiction over certain types of cases where the Board "for budgetary or other reasons" declined to act, the Board could not by agreement with the states "divide, with due regard to local interests, the domain over which Congress has given the National Board abstract discretion but which, practically, cannot be covered by it alone." In their view, "The inability of the National Board to exercise its dormant powers because of lack of funds ought not to furnish a more persuasive reason for finding that concurrent State power may function than a deliberate exercise of judgment by the National Board that industrial relations having both national and state concern can most effectively be promoted by an appropriate division of administrative resources between the National and the State Boards." (330 U. S. at 778, 779). And, the three Justices added, to hold that the federal Board could not invoke the aid of state agencies as an effective means of accomplishing a common end would be "to leave uncontrolled large areas of industrial conflict. Neither what Congress has said in the National

Labor Relations [Wagner] Act, nor the structure of the Act, nor its policy, nor its actual operation, should be found to prohibit the Board from exercising its discretion so as to enlist the aid of agencies charged with like duties within the States in enforcing a common policy by a distribution of cases appropriate to respective State and National interests." 330 U. S. at 784.

3. THE TAFT-HARTLEY AMENDMENTS

This was the posture of the law when the proposed Taft-Hartley amendments were being considered. *Bethlehem* left undecided the question of state power in cases where the federal Board declined jurisdiction "for budgetary or other reasons." Six of the Justices, however, seemed at least open to a suggestion that in such cases federal power lies "dormant and unexercised," and the States might act, and three of the Justices implied that this result should follow. To the extent that there was disagreement, if any, it was on the question whether the federal Board could, by agreement, cede jurisdiction to the States where "due regard to local interests" made it desirable and appropriate for the Board to enlist state aid.

Congress was aware of these problems when it amended the National Labor Relations Act and was likewise specifically aware of this Court's decision in *Bethlehem*. *Amalgamated Association* v. *Wisconsin Employment Relations Board*, 340 U. S. 383, 397–398 and footnotes thereto. Critical, therefore, is what Congress did in the amended Act to resolve these problems.

Congress left unchanged the broad statutory jurisdiction which it had accorded to the Board in the Wagner Act. And Congress left unchanged also the discretionary language of Section 10 (a) and 10 (b) under which the Board was "empowered," not "directed," to proceed in cases brought before it, and pursuant to which the Board has for budgetary or other administrative reasons continued to decline jurisdiction in certain categories of cases in order that it might better effectuate the policies of the Act in cases which it deems of greater importance to the national economy. See *Breeding Transfer Co.*, 110 N. L. R. B. 493.[18] The problem as to state power in this field, therefore, remained as it was before. Congress did not answer, at least in express terms, the question reserved in *Bethlehem* as to the power of States in cases where the Board declines "for budgetary or other reasons" to assert jurisdiction. It did, however, deal with the second question raised in the *Bethlehem* case, namely, the problem of cession by agreement. Thus, Congress specifically added to the language of Section 10 (a) which "empowered" the Board to deal with unfair labor practices the following proviso:

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[18] As already stated, *supra*, p. 3, n. 3, p. 8, n. 8, p. 11, the Board's power to decline jurisdiction pursuant to appropriate standards is not challenged here. Judicial authority confirms the propriety of the Board's practice in that regard. For manifestations of Congressional knowledge and approval of the Board's practice, see *Report of the Joint Committee on Labor-Management Relations*, S. Rep. 986, Part 3, 80th Cong., 2d Sess., 11–13; S. Rep. 99, 81st Cong., 1st Sess., 40; H. Rep. 1852, 81st Cong., 2d Sess., 10; *Hearings Before Senate Committee on Labor and Public Welfare on S. 249*, Part 1, 81st Cong., 1st Sess., 175–176, 177. *Hearings Before Senate Committee on Expenditures In The Executive Departments on S. Res. 248*, 81st Cong., 2d Sess., 40.

> *Provided,* That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

It is this proviso upon which the advocates of federal preemption principally rely to establish that, absent cession by the Board as therein provided, the Taft-Hartley Act completely supersedes state power in the field of unfair labor practices affecting interstate commerce and, by analogy, in the field of representation matters affecting commerce. In their view, the language of this proviso does more than meet the simple problem put in the *Bethlehem* case as to the scope and effect of cession agreements. Arguing from the principle *inclusio unius est exclusio alterius,* they maintain that Congress in the Section 10 (a) proviso dictated a method by which the States could obtain jurisdiction over representation and unfair labor practice matters affecting commerce, and having dictated this method, all other methods are inferentially precluded. The preemption advocates argue further that Congress thereby intended to insure that "the national labor policy will not be thwarted even in the predominantly local enterprises to which the proviso ap-

plies." *Amalgamated Association* v. *Wisconsin Employment Relations Board*, 340 U. S. 383, 397–398, n. 23. Finally, they argue that, when Congress chose to permit state regulation to be operative in the otherwise federally preempted field, it made specific provisions in the statute,[19] thus indicating that except as so provided, the States were not to intrude upon the federally preempted area. In sum, they contend that "Congress knew full well that its labor legislation 'preempts the field that the act covers insofar as commerce within the meaning of the act is concerned' and demonstrated its ability to spell out with particularity those areas in which it desired state regulation to be operative." *Amalgamated Association, supra*, 340 U. S. at 397–398. Since Congress did not "spell out with particularity" that the States were to obtain jurisdiction merely by virtue of the Board's declination of jurisdiction, the States could not do so. The fact that this construction gives rise to a "no-man's land" where neither federal nor state authority is operative is, in their view, at worst an unfortunate as well as unforeseen consequence which flows from the text and structure of the Act.

[19] See, in addition to the Section 10 (a) proviso, Section 8 (d) which provides, *inter alia*, for notice to state mediation and conciliation services in the event of certain strikes; Section 202 (c) and 203 (b) which define the role of state and local mediation services; Section 14 (a) which precludes States from defining as employees for collective bargaining purposes any individuals who under the federal Act would be supervisors; Section 14 (b) which preserves to the States the right to further condition or to outlaw union security agreements permissible under the federal Act; and Section 2 (2) and (3) which excludes States or political subdivisions thereof, and employees of such entities, from the operation of the federal Act.

The argument, we believe, has serious flaws. The advocates of federal preemption overlook the fact that the Act serves two distinct, though related, functions. The first function is "to prescribe the legitimate rights of both employees and employers in their relations affecting commerce" (Section 1 (b) of the Labor Management Relations Act of 1947). When Congress enacted the original National Labor Relations Act in 1935, it was concerned primarily with employee rights. Accordingly, in Section 7 of that Act, it set forth in broad terms the right of employees to engage in organizational activity, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for their mutual aid and protection. Section 8 of that Act implemented those rights. In 1947, however, Congress, as indicated above, concluded that protection of employee rights was not enough and that "certain practices by some labor organizations" (Section 1 of the amended Act) had arisen which, in the interest of safeguarding the free flow of commerce, called for a statutory declaration of the rights of employers also. Accordingly, Congress proscribed, particularly in Section 8 (b) of the 1947 Act, practices which it deemed to be intrusions upon those rights. Though couched in terms of prohibition, the statutory scheme makes it manifest that Congress intended to add to the federal protection given employee rights by the 1935 Act a parallel federal protection against intrusion on the rights of employers.

The *Amalgamated Association* case (*supra*) upon which the advocates of federal preemption rely is

concerned with this function of the Act, namely, the scope of the federal protection accorded the rights granted in the federal act. *Amalgamated Association* is but one of a line of decisions beginning with *Hill* v. *Florida*, 325 U. S. 538, and including more recently *United Auto Workers* v. *O'Brien*, 339 U. S. 454, and *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U. S. 62, in which this Court has held that, insofar as Congress has in the several provisions of the Act declared substantive rights of general application relating to employees and employers in all cases affecting interstate commerce, these rights are binding upon all tribunals, state as well as federal, dealing with controversies involving such rights. Congress has immunized these rights against invasion from any source.

The Act, however, in addition to declaring federally protected employee and employer rights, serves a second function. It establishes an administrative agency, the National Labor Relations Board, to supervise and enforce certain labor relations matters, *i. e.*, representation questions and unfair labor practice matters, set forth in the Act, and the question here is whether Congress intended the Board to have control of these matters to the exclusion of the States even where the Board for budgetary or other administrative reasons declines to assert that control. The *Amalgamated Association* case and the companion cases here cited did not present that issue, and the Court did not pass upon it. Indeed, wholly different considerations apply.

The distinction between the broad guarantees of the substantive rights prescribed in the Act and the lim-

ited function of the Board in administering certain of those rights is underscored by this Court's decision last term in the *Arkansas Oak Flooring* case. In that case, the question was whether the State of Louisiana could enjoin a majority union from engaging in peaceful picketing for recognition by an employer admittedly engaged in interstate commerce and subject to the Act. The picketing union, United Mine Workers, had filed none of the data or affidavits prescribed in Section 9 (f), (g), and (h) of the Act as a prerequisite for invoking the Board's processes. The Louisiana court held that since the union's non-compliance precluded it from obtaining recognition through the National Board, such recognition by the employer would be illegal, and picketing for that purpose could be enjoined. This Court reversed on the ground that the Section 9 (f), (g), and (h) provisions constituted merely a limitation on the Board's powers and not on the rights guaranteed by the Act. The Court said (at pp. 73–74):

> The noncompliance of the union with § 9 (f), (g) and (h) in the instant case precludes any right of the union to seek certification of its status by the Labor Board. *Such elimination of the Board does not, however, eliminate the applicability of the National Labor Relations Act, as amended, and does not settle the issue as to the right of the state court to enjoin the employees and their union from peacefully picketing the employer's plant for the purpose of securing recognition.*
>
> The industrial relations between the company and its employees nonetheless affect interstate

commerce and come within the field occupied by the National Labor Relations Act, as amended. *The Labor Board is but an agency through which Congress has authorized certain industrial relations to be supervised and enforced. The Act goes further. The instant employer, employees and union are controlled by its applicable provisions and all courts, state as well as federal, are bound by them.* [Emphasis added.]

In sum, then, we submit that the federal rights guaranteed by the Act and the jurisdiction of the Board in that regard cannot be equated. So far as employee and employer rights are concerned, the Act requires that those rights be respected by both state [20] and federal tribunals throughout the entire field reached by the federal commerce power except as the Act specifically reserved certain areas for state control (*supra,* n. 19). However, it does not follow that Congress, in creating the National Labor Relations Board to administer certain substantive rights guaranteed by the Act, intended to exclude States from that area altogether except by means of the cession proviso. Nor does it follow that Congress, in establishing certain procedures which the Board is to follow in the implementation of rights entrusted to its administration, intended to preclude state implementation of those rights where for one reason

[20] "The Court has ruled that a State may not prohibit the exercise of rights which the federal Acts protect." *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468, 474, quoted with approval in *Arkansas Oak Flooring, supra,* at p. 75, where the Board, as in these cases, although for a different reason, did not exercise jurisdiction.

or another Board procedures are inapplicable. While Congress did authorize the Board to administer the representation and unfair labor practice provision of the Act, it left to the Board the determination as to the extent to which its administrative regulation should be applied in this field. Under settled canons of federal-state jurisdiction applicable here (*supra*, pp. 20–23), state power would remain operative in the area to which the Board, as the agency of Congress, has seen fit not to extend the federal administrative process, so long as the exercise of such state power is in accord with, and not in derogation of, the federal law and rights secured thereby. As this Court said in *Bethlehem Steel*, 330 U. S. at 774:

> when federal administrative regulation has been slight under a statute which potentially allows minute and multitudinous regulation of its subject, * * *, or even where extensive regulations have been made, if the measure in question relates to what may be considered a separable or distinct segment of the matter covered by the federal statute and the federal agency has not acted on that segment, the case will be treated in a manner similar to cases in which the effectiveness of federal supervision awaits federal administrative regulation, * * *. The states are in those cases permitted to use their police power in the interval * * *. [Citations omitted.]

We believe this language is fully applicable here. Congress knew when it enacted the Taft-Hartley Act that the Board under the predecessor statute had carved out a segment of cases which it thought had

so limited an impact on the national economy as not to warrant expenditure of its limited resources. Under such circumstances, "where federal power has been delegated but lies dormant and unexercised" (330 U. S. at 775), the reserved powers of the States come into play.[21] If Congress disapproved of this result, which in our opinion *Bethlehem* foreshadowed, it could readily have fashioned language to make clear that throughout this delegated area, it "intended no regulation except its own." *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 236.

Congress did not do so. Nor, we submit, can the Section 10 (a) proviso be construed to reach this result. The significance which the advocates of fed-

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[21] This was the view of the Board under the Wagner Act. In its brief amicus to this Court in the *Bethlehem Steel* case, the Board said (at p. 69):

> In this field in which the National Board can but does not take jurisdiction, it is obviously more consonant with the policy of the National statute to permit enforcement of state laws embodying the same policy than to leave the employees' rights without any statutory protection. This justifies excepting this field from the otherwise exclusive grant of authority to the Board in Section 10 (a) * * *. The friction, confusion and uncertainty arising from the application of dual controls, to which we have referred, are nonexistent where the National Board will not exercise its jurisdiction. The National Board accordingly believes that the mere existence of the National statute should not deprive the states of power to apply a similar policy to employers over whom the National Board does not take jurisdiction.

Under the amended Act the Board, as a matter of practice, has refrained from intervening in any way in situations where the States, despite the absence of a cession agreement, have taken action with respect to cases over which the Board declines to assert jurisdiction. See the Board's Memorandum, pp. 10–11, filed with this Court in *United Construction Workers* v. *Laburnum Corp.*, 347 U. S. 656.

eral preemption attribute to Section 10 (a) mistakes, in our judgment, the Congressional purpose which prompted its adoption. As we read its origin and legislative history, the cession proviso does not deal with the problem of state authority where the Board declines to assert its jurisdiction for budgetary or other administrative considerations. As noted above, the proviso was adopted as a consequence of this Court's decision in *Bethlehem Steel, supra.* The concurring opinion in that case read the majority opinion as implying that the States could act where the Board's powers lay "dormant and unexercised" for budgetary or other reasons but that the Board was precluded from ceding to the States jurisdiction over enterprises where "due regard to local interests" made it desirable "to enlist the aid of agencies charged with like duties within the States in enforcing a common policy by a distribution of cases appropriate to respective State and National interests" (330 U. S. at 779, 784). In the view of the concurring Justices, if (as they read the "overtones" of the majority opinion) the States could act where the Board declined to assert jurisdiction because Congress had put it on "short rations," there was no compelling reason—indeed, the relevant considerations pointed the other way—why the Board could not by agreement cede jurisdiction to the States pursuant to "a *deliberate exercise of judgment by the National Board that industrial relations having both national and state concern can most effectively be promoted by an appropriate division of administrative resources between the National and the State Boards.*" [Emphasis added.] *Bethlehem*

Steel, supra, at 778. The cession of jurisdiction by the Board in these circumstances, the concurring opinion added, should be viewed not as an "encroachment upon national authority" but rather as an "effective means of accomplishing a common end" (330 U. S. at 783). The cession proviso, we believe, was designed to supply that authority to the Board, so that where the Board as a matter of deliberate judgment concludes that due regard for local interests makes it desirable to enlist the aid of state agencies, it can accomplish that purpose by agreement, subject to the qualification that the applicable state law is not inconsistent with federal law.[21]

The Board's administrative jurisdictional criteria, however, are not based upon such considerations. Examination of the Board's jurisdictional "yardsticks" (N. L. R. B., *Nineteenth Annual Report* (G. P. O. (1955), pp. 2–5)) and of the Board decisions in which they were promulgated reveals that they were in no wise prompted by "a desire to establish broader State jurisdiction * * *" (*Breeding Transfer Company,* 110 N. L. R. B. 493, 497).[22] Thus, the Board's

[21] It should be noted here that the Board has been unable, because of the prescribed conditions, to consummate any such agreements. Congress has been aware of this situation and considered the feasibility of deleting these conditions in order to reduce the tremendous volume of cases brought before the Board. S. Rep. 986, Joint Committee Report, 80th Cong., 2d Sess., 31 (1948). Congress, however, has taken no action in this regard. The advocates of federal preemption argue from this post-legislative history that Congress has thereby manifested its intent to preclude State action in the absence of cession by the Board. Precisely what inference may be drawn from such Congressional inaction is, in our judgment, wholly speculative.

[22] Thus, the Board enumerated among the criteria which it did apply "(1) the problem of bringing the caseload of the

jurisdictional standards are for the most part phrased in terms of dollar limits without regard to the nature of the industry involved.

The argument is advanced, however, that if the States may act where the Board declines to assert jurisdiction, the effect, if not the purpose, of the Board's jurisdictional limitations is to leave little or no room for the operation of the cession proviso. The argument, we think, is unpersuasive. If, for example, state law not inconsistent with the provisions of the federal Act existed, the Board could under the terms of the proviso cede jurisdiction completely over all cases affecting commerce arising in fields other than mining, manufacturing, communications and transportation without regard to dollar limits. This would include such important fields as the building and construction trades, retail and service industries, insurance companies, many public utilities, and the like. The only limitation on the Board's power of cession would be that it could not cede cases in "mining, manufacturing, communications, and transportation" unless they were predominantly local in character.

Moreover, the proviso, for example, could be operative under the Board's existing standards not only with respect to cases in industries other than the four

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Board down to manageable size, (2) the desirability of reducing an extraordinarily large caseload in order that we may give adequate attention to more important cases, (3) the relative importance to the national economy of essentially local enterprises as against those having a truly substantial impact on our economy, and (4) overall budgetary policies and limitations." *Breeding Transfer, ibid.*

specifically excepted, but even with respect to cases in those industries themselves. Thus, the Board presently asserts jurisdiction over non-retail industries which ship goods out of state or performs services out of state valued at $50,000 or more. It is apparent that an enterprise which meets this standard might nonetheless be predominantly local in character, so that it might well be desirable to cede to the States jurisdiction over such enterprises. Similarly, the Board will presently assert jurisdiction over a local transportation company if it receives as much as $100,000 from services rendered as a link in interstate operations. Here, too, the proviso, if otherwise applicable, might well empower the Board to cede jurisdiction because the transportation company was predominantly local in character. Insofar as the Board might choose to impose less stringent criteria in the field of mining, manufacturing, communications, and transportation, there would, of course, be even more scope for application of the proviso.

To recapitulate, we believe that Congress in Section 10 (a) of the amended Act reaffirmed that the Board, as the agency to which Congress delegated the handling of representation and unfair labor practice cases, should determine the extent to which federal jurisdiction should be asserted in order "to eliminate the causes of certain substantial obstructions to the free flow of commerce" (Section 1 of the original and amended Act). Within this area, Congress further provided that the Board could, by agreement, cede jurisdiction to a state but subject to the condition that state law was not inconsistent with applicable federal

law. Pending a determination by the Board or by Congress itself that a further extension of federal power in this field is required to effectuate the policies of the federal Act, the residual powers of the States may be exercised to fill the void which would otherwise arise and to regulate industrial relations within the field occupied by the Act but from which the Board has withdrawn, subject to the proviso declared by this Court that the parties "are controlled by its [the federal Act's] applicable provisions and all courts, state as well as federal, are bound by them." *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U. S. 62, 74.

C. THE "CONFLICT" TEST

Thus far, we have been discussing the question here presented in terms of "occupation of the field," namely, whether Congress in the exercise of its paramount commerce power has occupied the field so as to supersede state power. We do not overlook, however, the fact that conflict has likewise been regarded as a criterion by which to test the question of federal preemption. See *Garner* v. *Teamsters Union*, 346 U. S. 485; *United Construction Workers* v. *Laburnum Corp.*, 347 U. S. 656; *Bethlehem Steel, supra*, 330 U. S. 767. Generally speaking, this Court has held that where Congress has prescribed specific procedures for the resolution of representation issues or the prevention of unfair labor practices, conflicting state procedures to the same end are excluded. On the other hand, by parity of reasoning, where no such conflict exists, state

procedure survives. *Laburnum, supra,* 347 U. S. at 665.[24]

We doubt whether the conflict criterion, at least in this limited frame of reference, is anything other than an alternative phrasing of the occupation of the field theory. But we need not resolve that problem in this case. For, contrary claims notwithstanding, we submit that no basis is shown under the conflict criterion to warrant exclusion of state action here. The critical fact is that we are dealing here with cases where the Board declines to act altogether and the unchallenged premise is that that declination is proper in terms of effectuation of the Act. The Board's inaction in such a situation, unlike its inaction in *Bethlehem,* is not an exercise of the Board's judgment that no action is appropriate. It is, at most, a declaration by the Board, pursuant to the discretion vested in it by Congress, that effectuation of the policies of the Act does not require the application of federal power. Where the federal Board thus declines to act, the mere assertion of state power does not, without more, give rise to such conflict as to require the exclusion of state regulation. *Algoma Plywood Co.* v. *Wisconsin Employment Relations Board,* 336 U. S. 301, 313; *United Electrical, Radio and Machine Workers* v. *Worthington Corp.,* 38 L. R. R. M. 2507, 2510 (C. A. 1, decided July 31, 1956). The friction, confusion, and uncertainty arising from

[24] As we have already observed, n. 16, the term "conflict" is not to be interpreted in too literal a sense. Even where state and federal authority would apply parallel or duplicate remedies as, for example, in *Bethlehem* or possibly even in *Garner,* the potentialities of conflict exist where state and federal authority are each "brought to bear on precisely the same conduct." *Weber* v. *Anheuser-Busch, Inc.,* 348 U. S. 468, 479.

the application of dual controls in other contexts are non-existent here because the federal Board does not exercise nor assert control. So long as substantive conflict or impairment of federal rights is not shown, to forbid state control would be "needlessly to forbid preexisting State authority" (*Bethlehem Steel*, 330 U. S. at 780) and deliberately to create a "no-man's land" wholly unregulated. We believe that neither the statute nor judicial interpretation warrants this result.[25]

D. APPLICATION OF THE FOREGOING PRINCIPLES TO THE INSTANT CASES

Under its prevailing jurisdictional standards, the validity of which is not challenged here, the Board would have declined to assert its jurisdiction over the three instant cases. Indeed, in Case No. 280, the Board's General Counsel did decline jurisdiction over

[25] Petitioners in No. 41 and appellant in No. 280 argue also, citing *Retail Clerks* v. *Your Food Stores*, 225 F. 2d 659, 663 (C. A. 10), that if States were permitted to act in the area here under consideration without an express ceding of jurisdiction, "an interminable problem of determining jurisdiction would exist, throwing needless confusion into an area clearly pre-empted by Congress." The Board, as shown *supra*, notes 3, 8, has already by decision and public release set forth its jurisdictional standards. In answer to a similar complaint regarding the competence of States to adjudicate federal rights under the Act, this Court said in *Amalgamated Clothing Workers* v. *Richman Brothers*, 348 U. S. 511, 518–519:

> We cannot assume that this confidence [in the state courts] has been misplaced. Neither the course of this case, nor the history of state court actions since the decision in *Garner* v. *Teamsters Union*, 346 U. S. 485, demonstrates recalcitrance on the part of state courts to recognize the rather subtle line of demarcation between exclusive federal and allowable state jurisdiction over labor problems. * * *

the precise controversy brought before the Utah tribunal, and in Case No. 50, the Board declined jurisdiction over a representation case involving the Garmon enterprise. Accordingly, if the principles set forth in the preceding sections of this brief are correct, the States of Utah, California, and Ohio were free to assert jurisdiction in the respective cases.

This does not mean, however, that having elected to assert jurisdiction, the several state tribunals were free to apply their own law without regard to applicable federal law and to rights protected under the federal Act. As already shown, the several enterprises here involved were engaged in activities affecting interstate commerce and, accordingly, the "industrial relations between the compan[ies] and [their] employees * * * come within the field occupied by the National Labor Relations Act, as amended." *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U. S. 62, 74. Although the federal Board has voluntarily eliminated itself from exercising administrative jurisdiction, "[s]uch elimination of the Board does not, however, eliminate the applicability of the National Labor Relations Act, as amended * * *. The Labor Board is but an agency through which Congress has authorized certain industrial relations to be supervised and enforced. The Act goes further. The instant employer, employees and union are controlled by its applicable provisions and all courts, state as well as federal, are bound by them." *Ibid.* In the *Arkansas Oak Flooring* case, the Board did not exercise jurisdiction over the particular union involved because of the latter's failure to file data required by Section 9 of

the Act. That the Board's non-exercise of jurisdiction in the instant cases is due to its own voluntary action, rather than through the failure of a union to comply with Section 9, does not alter or diminish the controlling force of federal law. Here, as in *Arkansas Oak Flooring*, "the state court is governed by the federal law which has been applied to industrial relations, like these, affecting interstate commerce * * *. A 'State may not prohibit the exercise of rights which the federal Acts protect.' *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468, 474, and see *Garner* v. *Teamsters Union*, 346 U. S. 485, 494." *Id.* at 75.[20]

The question that remains, therefore, is whether the actions taken by the state courts in the instant cases conform to the controlling principles declared by this Court. We submit that they did, and that the actions here taken were in accord with the governing federal law and did not impair federal rights secured by the Act. Resolution of the instant cases does not require a complete catalogue of these rights. It is sufficient to indicate that Congress has accorded protection to the rights of both employees and employers in industrial relations affecting commerce. With respect to Case No. 280, the federal Act protects the right of the employees involved to engage in collective bargaining, and to be free of unlawful discrimination in the terms and conditions of their employment. The action taken by the Utah tribunal in no sense prohibited,

[20] As the *Arkansas Oak Flooring* case demonstrates, States would not be bound by those procedural provisions of the Act which Congress patently devised to be applicable to the National Labor Relations Board in the administration of the statutory provisions entrusted to its regulation.

or trenched upon, these rights; on the contrary, it insured against their continued violation. With respect to Case No. 41 and Case No. 50, the question presented was the right of a union to engage in picketing and other conduct for the purpose of obtaining a union-security agreement where the union involved was neither certified nor designated as, and did not represent a majority of the employees involved. No employee right guaranteed by the Act immunizes such conduct. Moreover, the finding of the state tribunals that such conduct was unlawful is consistent with the Board's findings in analogous situations that such conduct is violative of Section 8 (b) (2) of the Act and subject to a cease-and-desist order. See *Denver Bldg. & Constr. Trades Council*, 90 N. L. R. B. 1768; See also *Garner* v. *Teamsters Union*, 346 U. S. 485, 488–489; *Medford Bldg.* v. *Constr. Trades Council*, 96 N. L. R. B. 165.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgments below should be affirmed.

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DECEMBER, 1956.

APPENDIX

The relevant provisions of the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C. 141 *et seq.*) are as follows:

SECTION 1. * * *

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 65 Stat. 601, 29 U. S. C. 151, *et seq.*) are as follows:

* * * * * *

DEFINITIONS

SEC. 2. When used in this Act—

* * * * *

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condi-

tion of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with sections 9 (f), (g), (h), and (ii) unless following an election held as provided in section 9 (e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has

been certified as the representative of such employees under the provisions of section 9; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9; (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: *Provided,* That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act;

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided,* That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may

involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance

with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723–B, 723–C).

* * * * *

SEC. 14. (a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

* * * * *

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IN THE

Supreme Court of the United States

Nos. 41, 50, 280 October Term, 1956

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, LOCAL NO. 427, A.F.L. ET AL.,
Petitioners

vs.

FAIRLAWN MEATS, INC.

and

SAN DIEGO BUILDING TRADES COUNCIL, MILLMEN'S UNION, LOCAL 2020, BUILDING MATERIAL AND DUMP DRIVERS, LOCAL 36,
Petitioners

vs.

J. S. GARMON, J. M. GARMON and W. A. GARMON

and

P. S. GUSS D/B/A PHOTO SOUND PRODUCTS MANUFACTURING CO.,
Appellant

vs.

UTAH LABOR RELATIONS BOARD

On Writs of Certiorari to the Supreme Courts of the States of Ohio and California, and on Appeal from the Supreme Court of the State of Utah.

BRIEF OF THE COMMONWEALTH OF PENNSYLVANIA AS AMICUS CURIAE

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State Capitol

INDEX TO BRIEF

	PAGE
Interest of the Commonwealth of Pennsylvania.	1
Questions Presented	3
Summary of Argument	4
Argument:	
I. The National Labor Relations Board may not refuse to assert its statutory jurisdiction in labor relations cases affecting commerce solely because the employers' volumes of business fall below certain minimum standards promulgated by the Board as a prerequisite to its taking jurisdiction:	
A. The NLRB lacks the statutory authority to issue regulations imposing jurisdictional standards consisting of minimum volumes of interstate transactions and to decline to assert its jurisdiction in labor relations cases affecting commerce solely because these standards are not complied with	6
B. The refusal of the NLRB to enforce federal rights granted by the federal labor legislation violates the guaranty of due process of law provided by the Fifth Amendment to the Constitution of the United States	12
II. When the National Labor Relations Board declines to assert its jurisdiction in labor relations cases affecting interstate commerce and involving employers whose volumes of interstate business fall below the minimum prescribed by the National Board	

as a prerequisite to taking jurisdiction, an appropriate state agency may assert jurisdiction and apply state law:

A. State regulation of labor relations is not supplanted unless there is direct conflict with a regulation of Congress or with Congressional intent that there be no regulation at all 14

B. No conflict arises through state regulation when the NLRB declines to exercise its jurisdiction because of noncompliance with its jurisdictional standards:

1. No conflict can arise between state regulation and substantive or procedural provisions of the federal acts . 18

2. No conflict arises through state regulation since the declination of the NLRB to assert its jurisdiction is not a determination that there should be no regulation at all 19

3. No conflict arises between state regulation and Section 10(a) of the Labor Management Relations Act .. 21

4. No conflict arises between federal and state regulation because of confusion in determining jurisdiction .. 21

III. The National Labor Relations Board's jurisdictional regulations limit the scope of the federal labor relations acts 23

Conclusion 24

TABLE OF CITATIONS

CASES:

Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board, 336 U. S. 301 (1949) 21

Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U. S. 767 (1947) 10, 15, 19, 20, 23

Breeding Transfer Co., 110 N.L.R.B. No. 64 10

Federal Dairy Co., 91 N.L.R.B. 107 (1950) 8

Fred G. Hodges Bedding Co. v. Pennsylvania Labor Relations Board, No. 71 January Term, 1957 2

Garner v. Teamsters, Chauffeurs and Helpers Local Union No. 776 (AFL), 346 U. S. 485 (1953) 12, 16

Hill v. Florida, 325 U. S. 538 (1945) 15

In re W. T. Grant Co., 341 Pa. 70, 17 A. 2d 614 (1941) 1

International Union, UAW, AFL, Local 232 v. Wisconsin Employment Relations Board, 336 U. S. 245 (1949) 19

La Crosse Telephone Corp. v. Wisconsin Employment Relations Board, 336 U. S. 18 (1949) 16

National Labor Relations Board v. Denver Building and Construction Trades Council, 341 U. S. 675 (1951) 8, 10, 11, 23

National Labor Relations Board v. Fainblatt, 306 U. S. 601 (1939) 8

National Labor Relations Board v. Swift & Co., 130 F. Supp. 214, aff'd on other grounds, 233 F. 2d 226 (8th Cir.) (D.C.E.D. Mo. 1955) 13

Polish National Alliance v. National Labor Relations Board, 322 U. S. 643 (1944) 11

Weber v. Anheuser-Busch, Inc., 348 U. S. 468 (1955) 17, 22

STATUTES:

Pennsylvania Labor Relations Act, Act of June 1, 1937, P. L. 1168 et seq., as amended, 43 P.S. 211.1 et seq. (1956) 1

National Labor Relations Act as amended by the Labor Management Relations Act, 1947:

Section 6, 61 Stat. 140 (1947), 29 U.S.C. §156 (1952) 6

Section 10 (a), 61 Stat. 146 (1947), as amended, 29 U.S.C. §160(2) (1952) ..4, 11, 21

CONSTITUTION:

Fifth Amendment, United States Constitution . 5, 13

MISCELLANEOUS:

19 NLRB Ann Rep 2 (1954) 6

Remarks, Guy Farmer, Chairman, National Labor Relations Board, before the American Society for Personnel Administration, Cincinnati, Ohio, November 2, 1954 20

INTEREST OF THE COMMONWEALTH OF PENNSYLVANIA

The Commonwealth of Pennsylvania, in its sovereign capacity, has power to regulate the employment relationship in order to reduce industrial strife and encourage the amicable adjustment of industrial disputes. *In re W. T. Grant Co.*, 341 Pa. 70, 17 A. 2d 614 (1941).

To this end, the Legislature of Pennsylvania has enacted a comprehensive labor relations statute designed to supplement Federal legislation so that every labor relations question and dispute, involving enumerated unfair labor practices and questions of employee representation, and arising within the State might be heard or remedied under the appropriate authority, Federal or State. Act of June 1, 1937, P. L. 1168 et seq., as amended, 43 P.S. §211.1 et seq. (1956).

The statute provides for the creation of a Labor Relations Board with power to investigate, prevent and remedy unfair labor practices, and to determine questions concerning the representation of employees.

In order to effectuate the purposes of the act, the Pennsylvania Labor Relations Board has asserted jurisdiction, when the National Labor Relations Board has declined to do so, in cases involving employers whose volumes of interstate business fall short of the minimum prescribed by the National Board as a prerequisite for its taking jurisdiction. The right of the Pennsylvania Labor Relations Board to assert juris-

diction in such cases has been questioned, and the matter is currently before the Pennsylvania Supreme Court. *Fred G. Hodges Bedding Co. v. Pennsylvania Labor Relations Board*, No. 71 January Term, 1957.

The determination of this issue in the present causes will also dispose of the question in the Pennsylvania case. An adverse ruling by this Honorable Court would foster industrial conflict, impede the peaceful settlement of industrial disputes, and jeopardize the labor relations program of this State—all to the prejudice of the interests of Pennsylvania's citizens and residents.

An examination of the briefs filed in the State Court by the parties to the instant case indicates that some aspects of this question will not be adequately presented. It is believed that the brief which the Commonwealth hereby submits will promote more complete argument on this issue.

QUESTIONS PRESENTED

1. May the National Labor Relations Board refuse to assert its statutory jurisdiction in labor relations' cases affecting interstate commerce solely because the employers' volumes of interstate business fall below certain minimum standards promulgated by the National Board as a prerequisite to its taking jurisdiction?

2. May an appropriate state agency assert jurisdiction and apply state law when the National Labor Relations Board declines to assert its jurisdiction, in labor relations cases affecting interstate commerce and involving employers whose volumes of interstate business fall short of the minimum prescribed by the National Board as a prerequisite to its taking jurisdiction?

3. Do the jurisdictional regulations of the National Labor Relations Board, setting minimum standards of interstate transactions, limit the scope of the Federal Labor Relations Act and vest in the States exclusive jurisdiction over cases failing to comply with these standards?

SUMMARY OF ARGUMENT

1. The NLRB exceeded its statutory authority in promulgating regulations restricting the exercise of its jurisdiction to cases involving substantial volumes of interstate transactions. Since Congress intended to protect those industries whose quantitative economic effects on interstate commerce was relatively small, the Board's refusal to accept jurisdiction is inconsistent with the purposes of the national labor policy. Moreover, the withdrawal of protection from such industries actually impedes the development of collective bargaining and fosters industrial unrest. Even assuming that budgetary considerations compel the reduction of the Board's case load, the establishment of blanket rules of exclusion instead of case by case consideration is a fallacious method of conserving resources. Ceding appropriate cases to state agencies under section 10(a) of the LMRA and seeking increased funds from Congress offer adequate solutions.

2. The NLRA and the LMRA create a system of rights and remedies applicable to all enterprises whose transactions affect interstate commerce. Since these rights may be enforced only through the NLRB, the refusal by that body to exercise jurisdiction effectively cuts off the protection of the acts from a substantial class of employers. The declination of jurisdiction is unrelated to any labor policy, and hence, such refusal to enforce federal rights, whether "public" or "private", is repugnant to the due proc-

ess clause of the Fifth Amendment to the United States Constitution.

3. State regulation of labor relations is not supplanted unless it directly conflicts with the Congressional regulation or policy. When the NLRB declines to assert its jurisdiction for budgetary reasons, state regulation cannot conflict with any federal rule or procedure. In that case, labor relations are governed by the states or they are entirely ungoverned. The refusal of the Board to assert jurisdiction is not a declaration of preference for non-regulation, but of indifference to treatment. The existence of a provision for the ceding of the Board's jurisdiction to appropriate state labor boards is irrelevant to the determination of the question involved herein, since that section is operative only when the Board has asserted jurisdiction. The suggestion of possible conflict between state agencies and the national board because of a confusion as to proper jurisdiction appears unfounded. Present standards for determining jurisdiction are sufficiently clear and stable to form a guide for correct decisions.

4. While Congress granted the Board power to take jurisdiction over every case affecting commerce, the Board was permitted to limit the operative scope of the federal labor relations statutes. In the promulgation of the present jurisdictional standards the Board has determined the extent of the acts' coverage and consequently, federal jurisdiction. Hence, state agencies have exclusive jurisdiction over cases involving interstate transactions below the minimum jurisdictional volumes.

ARGUMENT

I. THE NATIONAL LABOR RELATIONS BOARD MAY NOT REFUSE TO ASSERT ITS STATUTORY JURISDICTION IN LABOR RELATIONS CASES AFFECTING COMMERCE SOLELY BECAUSE THE EMPLOYERS' VOLUMES OF INTERSTATE BUSINESS FALL BELOW CERTAIN MINIMUM STANDARDS PROMULGATED BY THE BOARD AS A PREREQUISITE TO ITS TAKING JURISDICTION

A. The NLRB Lacks the Statutory Authority To Issue Regulations Imposing Jurisdictional Standards Consisting of Minimum Volumes of Interstate Transactions and To Decline To Assert Its Jurisdiction in Labor Relations Cases Affecting Commerce Solely because These Standards Are Not Complied With

The LMRA provides that "the Board shall have authority . . . to make . . . such rules and regulations as may be necessary to carry out the provisions of this Act." 61 Stat. 140 (1947), 29 U.S.C. §156 (1952). In 1954 the Board promulgated certain jurisdictional standards, consisting of minimum volumes of interstate transactions, and announced that it would refuse to exercise its jurisdiction when these standards were not complied with. 19 NLRB Ann. Rep. 2 (1954). These jurisdictional regulations fail utterly to effectuate the national labor relations acts; on the contrary, they are inconsistent with the purposes of these acts.

Congress in its regulation of interstate commerce, through the removal of the causes of industrial strife, sought to reach all such commerce be it great or small. The exclusion of the "small" is therefore incompatible with the intention of Congress.

> "The language of the National Labor Relations Act seems to make it plain that Congress has set no restrictions upon the jurisdiction of the Board to be determined or fixed exclusively by reference to the volume of interstate commerce involved. Section 2 (6) defines commerce as 'trade, traffic, commerce, transportation, or communication among the several States,' without reference to its volume, and declares in subsection (7) that 'The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.' Section 10(a) confers on the Board authority 'to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce.'
>
> "*The Act on its face thus evidences the intention of Congress to exercise whatever power is constitutionally given to it to regulate commerce* by the adoption of measures for the prevention or control of certain specified acts—unfair labor practices—which provoke or tend to provoke strikes or labor disturbances affecting interstate commerce. *Given the other needful conditions, commerce may be affected in the same manner and*

> *to the same extent in proportion to its volume, whether it be great or small. Examining the Act in the light of its purpose and of the circumstances in which it must be applied we can perceive no basis for inferring any intention of Congress to make the operation of the Act depend on any particular volume of commerce affected more than that to* which courts would apply the maxim *de minimis.*" (Emphasis added)
>
> *National Labor Relations Board v. Fainblatt*, 306 U. S. 601, 606-07 (1939), quoted with approval in *National Labor Relations Board v. Denver Building and Construction Trades Council*, 341 U. S. 675, 684 (1951).

The Board has candidly admitted that accepting jurisdiction over cases which fail to meet its jurisdictional standards would serve to carry out the purposes of the acts. Thus, it was said in the case which set the minimum interstate purchase standard currently enforced:

> "Although it would effectuate the policies of the statute to assert jurisdiction in cases of this kind where the direct inflow is substantial, due regard for these (budgetary) factors requires that we continue to decline jurisdiction where the direct inflow is less than $500,000 in value annually."
>
> *Federal Dairy Co.*, 91 N.L.R.B. 107 (1950).

Moreover, the Board's jurisdictional yardsticks, by withdrawing the protection of the acts from a substantial segment of industries affecting interstate commerce, actually impede the development of collective

bargaining and foments serious industrial unrest. Member Murdock makes this quite clear:

> "On the basis of the spot statistics in [various] industries . . . it seems probable that at least 25 percent and perhaps as much as 33⅓ percent of our past jurisdiction is now eliminated."
>
> . . . . . .
>
> "The new standards, though described by the majority as effectuating the purposes of the Act, have precisely the opposite effect. While it is not the Board's function to force collective bargaining on any employees, we cannot overlook the fact that the Congressional policy laid down in the 1935 Act and left unchanged in the 1947 amendments is to 'encourage the practice and procedure of collective bargaining' as a means of eliminating industrial disputes which burden commerce. Yet the specialized knowledge of this agency leads inexorably to the finding that a large share of the specific enterprises now cut loose from the Board's jurisdiction constitute an area of potential and real labor unrest which should demand the Board's close attention. The hundreds of thousands of employers and millions of employees at work in those enterprises now cut out from the Act form, as a whole, the very area in which organization of employees is least advanced and most vigorously pressed at the present time. Retail stores, particularly of the chain variety, small plants and operations, plants set up for national defense work under sub-contracts, small trucking concerns, franchised dealers in automobiles and

> farm machinery—these are the areas which at present have the lowest incidence of collective bargaining and employee self-organization and these are the areas, as the Board well knows, in which organizational activity by unions is most intense. It is very definitely the Board's concern that this area of intensifying union and anti-union activity of both the legal and illegal types is also precisely the area of greatest industrial unrest with the resulting serious threat to the free flow of commerce which Congress sought to protect. While it is true that many of these employers are small, it has earlier been noted that Congress specifically refused to exempt small employers from the Act . . .
>
> . . . . . .
>
> "I must therefore ask, with all candor, precisely how the majority proposes to 'effectuate the policies of the Act' by denying these employers and employees the very protection the statute was enacted to provide."
>
> (*Breeding Transfer Co.*, 110 N.L.R.B. No. 64) (Murdock Dissenting)

The Board sometimes properly refuses to accept jurisdiction of cases in order to enforce a labor policy. *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U. S. 767, 774 (1947); *National Labor Relations Board v. Denver Building and Construction Trades Council*, 341 U. S. 675, 684 (1951) (see p. 19 *infra*). However, the Board was motivated by budgetary considerations rather than labor policy in an-

nouncing its jurisdictional regulations (see pp. 19-20 *infra*.)

Blanket minimum standards taking account only of quantitative economic effect is a fallacious method of conserving the Board's resources. This Court has pointed to the error of abandoning the case-by-case approach:

> "'. . . Congress gave the Board authority to prevent practices tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce' . . . Congress therefore left it to the Board to ascertain whether proscribed practices would in particular situations adversely affect commerce when judged by the full reach of the constitutional power of Congress. *Whether or no practices may be deemed by Congress to affect interstate commerce is not to be determined by confining judgment to the quantitative effect of the activities immediately before the Board. Appropriate for judgment is the fact that the immediate situation is representative of many others throughout the country, the total incidence of which if left unchecked may well become far-reaching in its harm to commerce.*" (Emphasis added)
>
> *Polish National Alliance v. National Labor Relations Board*, 322 U.S. 643, 648 (1944) quoted with approval in *National Labor Relations Board v. Denver Building and Construction Trades Council*, 341 U.S. 675, 683 n. 13 (1951).

A method of reducing the Board's case load is provided by the LMRA itself. Section 10 (a), 61 Stat

146 (1947), as amended, 29 U.S.C. § 160(2) (1952), permits the Board to cede jurisdiction, case-by-case, to state agencies for enforcement of state law, the applicable provisions of which are consistent with those of the federal act.

A further remedy, if the Board fears being overburdened, lies in seeking a larger Congressional appropriation instead of depending upon quantitative rules of exclusion.

B. The Refusal of the NLRB To Enforce Federal Rights Granted by the Federal Labor Legislation Violates the Guaranty of Due Process of Law Provided by the Fifth Amendment to the Constitution of the United States

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The NLRA and the LMRA create a system of federal rights and remedies in the field of labor relations. This pattern of protection is given to all enterprises whose activities affect interstate commerce. While these rights are "public rights" in the sense that they may be enforced only through the administrative process, for constitutional purposes, this classification has no significance. *Garner v. Teamsters Union*, 346 U.S. 485, 500 (1953).

The refusal of the Board to exercise its jurisdiction in cases where commerce is affected, but not sufficiently to satisfy the Board's jurisdictional standards, effectively cuts off a class of enterprises from all rights under these acts.

This declination of jurisdiction and denial of a forum is based not on the merits of a case, not on the re-

lationship of the parties, not on the nature of a proceeding, not on any policy relating to the effectuation and fostering of collective bargaining or the promotion of a free flow of goods in interstate commerce by the elimination of labor disputes, but solely on the arbitrary basis of dollar volume of interstate transactions according to a schedule designed for the administrative convenience of the Board.

It is submitted that such an arbitrary denial of federal rights to those entitled to them constitutes an infringement of the guaranty of due process of law provided by the Fifth Amendment to the United States Constitution. *Cf. National Labor Relations Board v. Swift & Co.*, 130 F. Supp. 214 (D.C. E.D. Mo. 1955), affirmed on other grounds, 233 F. 2d 226 (8th Cir).

II. WHEN THE NATIONAL LABOR RELATIONS BOARD DECLINES TO ASSERT ITS JURISDICTION IN LABOR RELATIONS CASES AFFECTING INTERSTATE COMMERCE AND INVOLVING EMPLOYERS WHOSE VOLUMES OF INTERSTATE BUSINESS FALL BELOW THE MINIMUM PRESCRIBED BY THE NATIONAL BOARD AS A PREREQUISITE TO TAKING JURISDICTION, AN APPROPRIATE STATE AGENCY MAY ASSERT JURISDICTION AND APPLY STATE LAW

A. State Regulation of Labor Relations Is Not Supplanted unless There Is Direct Conflict with a Regulation of Congress Or with Congressional Intent That There Be No Regulation at All

"The same regard for the harmonious balance of our federal system, whereby the States may protect local interests despite the dormant Commerce Clause, allows State legislation for the protection of local interests so long as Congress has not supplanted local regulation either by a regulation of its own or by an unmistakable indication that there is to be no regulation at all.

"* * * The problem is one of judicial accommodation between respect for the supplanting authority of Congress and the reserved police power of the States. Long ago this policy of accommodation was formulated by this Court: 'We agree, that in the application of this principle of suprem-

acy of an act of Congress in a case where the State law is but the exercise of a reserved power, *the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together.*' Sinnot v. Davenport, 22 How. 227, 243."

* * * * * * * *

"A survey of the scores of cases in which the claim has been made that State action cannot survive some contradictory command of Congress leaves no doubt that State action has not been aside on mere generalities about Congress having 'occupied the field,' or on the basis of loose talk instead of demonstrations about 'conflict' between State and federal action. We are in the domain of government and practical affairs, and this Court has not stifled State action, unless what the State has required, in the light of what Congress has ordered, would truly entail contradictory duties or make actual, not argumentative, inroads on what Congress has commanded or forbidden." (Emphasis added)

Hill v. Florida, 325 U.S. 538, 547-48, 552 (1945) (Frankfurter dissenting).

This Honorable Court has consistently adhered to this doctrine expounded by Mr. Justice Frankfurter. Accordingly, in every case in which the principle of federal pre-emption has been applied to strike down state jurisdiction, the requisite conflict has been foreseen.

So in *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767, 776 (1947):

> "If the two boards attempt to exercise a concurrent jurisdiction to decide the appropriate unit of representation, action by one necessarily denies the discretion of the other. The second to act either must follow the first, which would make its action useless and vain, or depart from it, which would produce a mischievous conflict."

And in *La Crosse Telephone Corp. v. Wisconsin Employment Relations Board*, 336 U.S. 18, 26 (1949):

> "A certification by a state board under a different or conflicting theory of representation may therefore be as readily disruptive of the practice under the federal act as if the orders of the two boards made a head-on collision. These are the very real potentials of conflict which lead us to allow supremacy [Footnote omitted] to the federal scheme even though it has not yet been applied in any formal way to this particular employer."

Again in *Garner v. Teamsters, Chauffeurs and Helpers Local Union No. 776 (AFL)*, 346 U. S. 485, 490-91 (1953):

> "Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies.
>
> • • • • • • • •

A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law."

Recently, in *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 480-81 (1955):

> "By the Taft-Hartley Act, Congress did not exhaust the full sweep of legislative power over industrial relations given by the Commerce Clause. Congress formulated a code whereby it outlawed some aspects of labor activities and left others free for the operation of economic forces. As to both categories, the areas that have been pre-empted by federal authority and thereby withdrawn from state power are not susceptible of delimitation by fixed metes and bounds. Obvious conflict, actual or potential, leads to easy judicial exclusion of state action.
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> . . . . . .
>
> Regarding the conduct here in controversy, Congress has sufficiently expressed its purpose to bring it within federal oversight and to exclude state prohibition, even though that with which the federal law is concerned as a matter of labor relations be related by the State to the more inclusive area of restraint of trade."

Conversely, state regulation has been upheld when no conflict with the federal act appeared. As summarized in the *Weber* case *supra*, 348 U. S. at 474-77: The states are permitted to exercise their authority to enjoin mass picketing accompanied by threats of bod-

ily injury and property damage; to prevent recurrent, unannounced work stoppages; to forbid enforcement of a maintenance-of-membership clause in a contract between an employer and a union since nothing in the federal acts sanctioned or forbade such a clause, and finally, when no federal administrative relief is available with which a state remedy might conflict, to entertain actions for damages based on violent union conduct.

B. No Conflict Arises Through State Regulation When the NLRB Declines To Exercise Its Jurisdiction Because of Non-Compliance With Its Jurisdictional Standards

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1. No conflict can arise between state regulation and substantive or procedural provisions of the federal acts.

The Board's refusal to assert its jurisdiction removes the protection of the federal acts from those enterprises which fail to qualify under the quantitative jurisdictional criteria. No federal forum is available, no federal procedures may be employed and no federal substantive labor relations provisions are applied to such businesses. For them, the Board has rejected the uniformity of control and the centralized administration provided by the national labor policy. As long as it adheres to present jurisdictional yardsticks "there is no existing or possible conflict or overlapping between the authority of the Federal and

State Boards [or Courts] : . . . This conduct is governable by the State or it is entirely ungoverned."

International Union, UAW, AFL, Local 232 v. Wisconsin Employment Relations Board, 336 U.S. 245, 254 (1949).

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2. No conflict arises through state regulation since the declination of the NLRB to assert its jurisdiction is not a determination that there should be no regulation at all.

State action is not permissible "where failure of the federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute." *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767, 774 (1947). The National Labor Relations Board's refusal to entertain foremen's petitions, for example, was designed to effectuate a labor policy. "It made clear that its refusal to designate foremen's bargaining units was a determination and an exercise of its discretion to determine that such units were not appropriate for bargaining purposes. (citation omitted) *We cannot, therefore, deal with this as a case where federal power has been delegated but lies dormant and unexercised.*" 330 U.S. at 775 (Emphasis added).

When the Board refuses to accept jurisdiction except in accordance with its quantitative yardsticks, its power lies "dormant and unexercised," not to effectuate a labor policy, but for budgetary reasons and administrative convenience. As the Chairman of the

Board explained the motives for the promulgation of the 1954 standards:

> "I have long been convinced that the National Board could increase its contribution to the intelligent handling of labor relations by reducing its mammoth case load, and thus enabling its Members to devote more time and attention to a smaller number of disputes which have a more substantial impact upon our nation's economy. Thus it was that late last summer we revised our jurisdictional standards with a view towards withdrawing from some small, local enterprises over which the Board had previously asserted jurisdiction."
>
> (*Remarks by Guy Farmer, Chairman, National Labor Relations Board before the American Society for Personnel Administration, Cincinnati, Ohio, November* 2, 1954.)

It would, therefore, seem difficult to infer that the refusal of the NLRB to accept jurisdiction for budgetary reasons is a ruling similar in character and motivated by the same considerations of labor policy as an administrative ruling by the same Board refusing to certify foremen. What is said of Congress applies equally to the Board: "Where it leaves the employer-employee relation free of regulation in some aspects, it implies that in such matters federal policy is indifferent, and since it is indifferent to what the individual of his own volition may do we can only assume it to be equally indifferent to what he may do under the compulsion of the state." *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U. S. 767, 773 (1947).

3. No conflict arises between state regulation and Section 10(a) of the Labor Management Relations Act.

By its terms, section 10(a), 61 Stat. 146 (1947), as amended, 29 U.S.C. § 160(2) (1952), provides for the ceding to state labor boards, under certain conditions, of cases over which the National Board has taken jurisdiction. When the Board declines to act it removes the coverage of the federal acts over the class of cases rejected, and there exists no concurrency of regulation which this provision envisages. ". . . Cession of jurisdiction is to take place only where State and federal laws have parallel provisions. *Where the State and federal laws do not overlap, no cession is necessary because the State's jurisdiction is unimpaired.*" (Emphasis added)

> *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board*, 336 U.S. 301, 313 (1949).

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4. No conflict arises between federal and state regulation because of confusion in determining jurisdiction.

The National Board, the state boards and state courts must determine their own jurisdiction to adjudicate each case brought to their attention. This Court has noted that it is not always easy for a state agency to determine whether the subject matter in a particular proceeding is the concern exclusively of the federal Board and withdrawn from the regulation of the states. Difficulty in determining state jurisdiction, however, is not a basis for denying all state regu-

lation. *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 481 (1955).

It is submitted that the jurisdictional standards set forth by the Board mean what they say, and that it is within the competence of state agencies to determine therefrom the permissible areas of state jurisdiction. Since the Board's jurisdictional criteria, in actuality, do not bounce back and forth from month to month like a ping-pong ball, as has been suggested, predictions of "intolerable confusion" seem unduly pessimistic.

III. THE NATIONAL LABOR RELATIONS BOARD'S JURISDICTIONAL REGULATIONS LIMIT THE SCOPE OF THE FEDERAL LABOR RELATIONS ACTS

Congress has granted to the National Board power to take jurisdiction over such portion of the nation's commerce as it sees fit, even to the full extent of the federal constitutional power. *National Labor Relations Board v. Denver Building and Construction Trades Council*, 341 U.S. 675, 684 (1951). The Board was delegated the power to make regulations to carry out the provisions of the acts. 61 Stat. 140 (1947), 29 U.S.C. § 156 (1952). In exercising this power to promulgate minimum jurisdictional standards, the Board, in effect, limited the operative scope of the federal labor acts. Congress could have itself narrowed jurisdiction under the labor relations statutes to transactions *substantially* affecting commerce. Instead, it chose to delegate to the Board, in the exercise of its discretion, the power to determine how far the coverage of the acts should extend. By the present jurisdictional yardsticks, the Board has made that determination. Accordingly, federal jurisdiction is coextensive with, and limited to, the jurisdictional standards announced by the Board. Hence, as to employers whose volumes of interstate transactions fall below the jurisdictional standards, the state agencies have *exclusive* jurisdiction. *Cf. Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767, 774 (1947). (States may act on "separable segments" of a federally regulated subject matter.)

CONCLUSION

Decisions by This Honorable Court that the NLRB need not, and the state agencies may not, regulate the small interstate employer would seriously discriminate against intrastate commerce. For, while the substantial interstate employer falls within the coverage of the federal labor law, smaller enterprises affecting primarily intrastate commerce, are denied the protection of both federal and state labor law. Such decisions would insulate the most industrially harmful labor practices from all legal remedy. It would encourage employers to adjust their volumes of interstate transactions so as to fall within a "no-man's land" where anti-collective bargaining practices could openly be indulged in.

For these reasons it is respectfully requested that This Honorable Court reach decisions which will either:

1. Invalidate the refusal of the NLRB to assert its statutory jurisdiction in labor relations cases affecting commerce on the sole ground that the employers' volumes of interstate transactions fall below certain minimum standards promulgated by the Board as a prerequisite to its taking jurisdiction; or,

2. Permit appropriate state agencies to assert jurisdiction and apply state law when the NLRB declines to accept jurisdiction in labor relations cases involving employers whose volumes of interstate business fall

short of the minimum prescribed by the Board as a prerequisite to its taking jurisdiction.

Respectfully submitted,

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December 15, 1956

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In the Supreme Court of the United States

OCTOBER TERM, 1956.

No. 41.

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, LOCAL NO. 427, A. F. L., *et al.*,

Petitioners,

vs.

FAIRLAWN MEATS, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

PETITION FOR REHEARING.

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TABLE OF CONTENTS.

Petition for Rehearing 1

The effect of this decision, which admittedly creates a vast no-man's-land where no agency or court, state or federal, has jurisdiction to entertain, hear and decide cases involving constitutionally and statutorily guaranteed rights, is to completely deprive the vast segment of the community falling within the vacuum area of their constitutional rights without due process of law in violation of the 5th, 10th, and 14th Amendments to the Constitution of the United States 2

Brief statement of grounds for Petition for Rehearing 6

Conclusion 14

Certificate of Counsel 17

TABLE OF AUTHORITIES.

Cases.

Algoma P. & V. Co. vs. W. E. R. B., 336 U. S. 301 3

Amalgamated Meat Cutters and Butcher Workmen of North America Local No. 427 A. F. L. vs. Fairlawn Meats, Inc., 25 Law Week 4215 2

Bethlehem Steel Co. vs. NYLRB, 330 U. S. 767 ..... 6, 15, 16

Brinkerhoff vs. Hill, 281 U. S. 673 ..... 4, 5, 13

Building Trades Council vs. Kinard, 346 U. S. 933 3

Garner vs. Teamsters, 346 U. S. 485 ..... 3, 6, 11

Guss, doing business as Photo Sound Products Manufacturing Co. vs. Utah Labor Relations Board, 25 Law Week 4212 ..... 2, 3, 6, 7

International Union vs. W. E. R. B., 336 U. S. 245 ..... 6, 9

Interstate Commerce Commission vs. U. S. Ex Rel., 224 U. S. 474 8

Labor Board vs. Denver Bldg. & Constr. Trades Council, 341 U. S. 675 7

Labor Board vs. Fainblatt, 306 U. S. 601 ..... 6, 7

N. L. R. B. vs. Jones & Laughlin Steel, 301 U. S. 1 ..... 3, 11

N. L. R. B. vs. Sterling Electric Motors, 114 F. (2) 738 (9 Cir.) 8

San Diego Building Trades Council vs. J. S. Garmon, 25 Law Week 4216 2

Truax vs. Corrigan, 257 U. S. 312 ..... 4, 5, 10, 13

United Construction Workers vs. Laburnum, 347 U. S. 656 ..... 3, 9, 11, 12

U. S. ex rel. vs. I. C. C., 246 U. S. 638 8

U. S. ex rel. vs. I. C. C., 252 U. S. 178 8

U. S. ex rel. vs. I. C. C., 294 U. S. 50 8

Weber vs. Anheuser-Busch, 348 U. S. 468 ..... 3, 6, 10

Text.

34 *Am. Jur.* 909, Mandamus, Secs. 126 and 127 8

Constitution.

Constitution of the United States:

Fifth Amendment 2, 10
Tenth Amendment 2
Fourteenth Amendment 2, 10

Statutes.

National Labor Relations Act:

Section 10(a) 4, 7, 9, 16

28 U. S. C. A. 1404(a) 10

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vs.

FAIRLAWN MEATS, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

PETITION FOR REHEARING.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now Fairlawn Meats, Inc., a corporation, Respondent in Cause No. 41, October Term, 1956, and, pursuant to Rule 58 (1) of this Court's Rules respectfully petitions the Court to grant its Petition for Rehearing as to the issues raised in said cause, and to set aside the Court's opinion rendered on March 25, 1957, vacating the judgment of the Ohio Court of Appeals and the Ohio Supreme Court below and remanding this cause for further proceedings not inconsistent with said opinion of this Court. As grounds for said Petition for Rehearing your petitioner states:

1. This cause was argued, considered, and decided in conjunction with two other causes[1] so that all three opinions, and the single dissenting opinion applicable to all three cases, must be examined together to appreciate the full effect of this trio of cases on this field of law. We will, therefore, generally treat all four opinions as though they constitute a single decision. Indeed, the opinion in this case specifically states that the decision in *Guss v. Utah L. R. B.*, controls.

2. Petitioner requests rehearing solely on one principal basis. Our request is based on the fact that the Court has completely ignored and apparently overlooked the fact that

> **The effect of this decision, which admittedly creates a vast no-man's-land where no agency or court, state or federal, has jurisdiction to entertain, hear and decide cases involving constitutionally and statutorily guaranteed rights, is to completely deprive the vast segment of the community falling within the vacuum area of their constitutional rights without due process of law in violation of the 5th, 10th, and 14th Amendments to the Constitution of the United States.**

We request rehearing on the issue that denial of due process of law has been inadvertently and unintentionally sanctioned by the March 25, 1957, decisions because:

a. Although the issue of due process of law was raised in the briefs, that argument is neither mentioned

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[1] *P. S. Guss, doing business as Photo Sound Products Manufacturing Co. vs. Utah Labor Relations Board*, 25 Law Week 4212; *Amalgamated Meat Cutters and Butcher Workmen of North America Local No. 427 A. F. L. vs. Fairlawn Meats, Inc.*, 25 Law Week 4215; *San Diego Building Trades Council vs. J. S. Garmon*, 25 Law Week 4216.

nor answered anywhere in any of the four opinions announced, either majority or dissent.

b. Although previous decisions of this Court on the subject of federal preemption[2] have gone to great lengths and have been most explicit to demonstrate how the decisions there reached protect the basic right of due process, not one of the opinions announced herein refer to such language or make any attempt whatsoever to distinguish this case from those.

c. Although earlier cases on preemption have sometimes sustained and sometimes rejected the exercise of state jurisdiction in this field, it has never before done so in a manner that would leave judicial jurisdiction of litigation over historically recognized and constitutionally guaranteed rights in no competent tribunal whatsoever.

d. The opinion in *Guss* states that Congress' power in the area of commerce is so great that "its judgment must be respected whatever policy objections there may be to creation of a no-man's-land." We submit that the policy expressed in the Due Process Clause of the Constitution asserts a constitutional objection to the creation of a complete jural vacuum applicable solely to small business enterprises that must, on the contrary, be respected by Congress. Where the only issue is interpretation, and choice between two equally valid meanings of a statute, it is true that Congress' judgment as to which alternative policy is preferable must be accepted and respected. But where the policy adopted by Congress directly violates

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[2] *N. L. R. B. vs. Jones & Laughlin Steel*, 301 U. S. 1; *Garner v. Teamsters*, 346 U. S. 485; *United Construction Workers v. Laburnum*, 347 U. S. 656; *Weber v. Anheuser-Busch*, 348 U. S. 468; *Algoma P. & V. Co. v. W. E. R. B.*, 336 U. S. 301; *Building Trades Council v. Kinard*, 346 U. S. 933.

the absolute rights guaranteed by the Constitution, that legislative policy must be rejected by this Court even if it is expressed with unmistakable clarity. Congress' legislative power, however plenary, may only be exercised within constitutional limitations.

e. The opinion herein indicates that where the choice is between a judicial no-man's-land and a legislative attempt to achieve uniformity, the latter must prevail, without any recognition that Due Process—"a Day in Court"—is thereby denied.[3] We submit that where the alternatives are judicial Due Process or legislative objectives, the Constitution demands that the former be satisfied.

f. Satisfaction of the Constitutional requirement of Due Process can not be made dependent on the discretionary decision of an administrative tribunal to "reduce the area of the no-man's-land by reasserting its jurisdiction" or by "ceding jurisdiction under Section 10(a)." This is especially true since it is impossible to require the Board to do so,[4] since the Board has never in fact occupied the entire no-man's-land since its creation, and since it is impossible for the Board to execute any cession agreements under present circumstances. No matter what action the Board may decide to take in the future, in its uncontrolled discretion, Due Process will be denied in the interim and can equally be denied by a subsequent reversal of Board policy, if the March 25 decisions are permitted to stand.

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[3] *Truax vs. Corrigan*, 257 U. S. 312; *Brinkerhoff vs. Hill*, 281 U. S. 673.

[4] Sec. 10(a). The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *

Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry, etc.

g. Nor may Due Process be denied because Congress may at some unknown future date decide to cure the unconstitutional deprivation of rights created by it and sanctioned by the opinions herein.

h. No matter how the opinions herein are worded or interpreted, the inescapable meaning and effect are the same: The Constitutional right of Due Process of law which guarantees a "Day in Court," and a judicial hearing and decision, as well as the statutory rights prescribed in the National Labor Relations Act itself, must be and will be provided only to those persons engaged in large business enterprises, but must be and will be denied to those who are too small to meet the Board's arbitrarily established jurisdictional standards.

i. We submit that Due Process of Law, in its constitutional and primary sense as defined by this Court, "requires that *every man* shall have the protection of his day in Court" [5] and the decisive question is "whether (he) has had an opportunity to present (his) case and be heard in its support." [6] That right is abridged and denied where a litigant is banished to a judicial no-man's-land where no tribunal has *jurisdiction* to entertain, hear, and decide his complaint. Affording due process only to those few applicants of sufficient financial stature to meet the Board's arbitrary, discretionary, but legally authorized jurisdictional standards draws a wholly unreasonable, indefensible, and unconstitutional line and denies due process to some men only because they are small where the Constitution requires that it be granted to all.

3. For the reasons above mentioned, and more fully stated below, we respectfully request that this Petition for Rehearing be granted.

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[5] *Truax v. Corrigan*, 257 U. S. 312, 66 L. Ed. 254, 263.

[6] *Brinkerhoff-Faris T. S. Co. v. Hill*, 281 U. S. 673, 678.

BRIEF STATEMENT OF GROUNDS FOR PETITION FOR REHEARING.

As this Court stated in the majority opinion in the *Guss* case, "some background is necessary for an understanding of this problem in federal-state relations." This is especially true where the effect of the Due Process clause is to be examined. Part of this necessary background is the scope of the Act itself. Thus, when this Court, in the *Guss* opinion, states that Congress, by its language "empowering" the Board to prevent unfair practices, and by its definition of "affecting commerce" meant to reach "the full extent of its power under the commerce clause," that statement must be tempered by the language in other recent decisions of this Court. For example, "Congress has dealt with the subject but partially." [7] The Act "leaves much to the States." [8] "By the Taft Hartley Act, Congress did *not* exhaust the full sweep of legislative power over industrial relations given by the Commerce Clause." [9]

Unless a multitude of earlier cases are to be impliedly overruled, it must be accepted that the Act does not preempt all state jurisdiction to the full extent possible, because "Congress designedly left open an area for state control." [10] The *Fainblatt* case, [11] which the *Guss* opinion cites as to the extent of preemption, deals only with the quantum of "affect" on commerce that is required before the Board may exercise the powers granted to it. *Fainblatt* merely makes clear that any amount over "de minimus" will suffice.

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[7] *Bethlehem Steel Co. v. NYLRB*, 330 U. S. 767.

[8] *Garner v. Teamsters*, 346 U. S. 485.

[9] *Weber v. Anheuser-Busch*, 348 U. S. 468.

[10] *International Union v. W. E. R. B.*, 336 U. S. 245.

[11] *Labor Board v. Fainblatt*, 306 U. S. 601.

But, as the earlier cases made clear, this is far from saying that Congress intended to completely preempt state jurisdiction in the entire area where *Fainblatt permitted* the Board to enter. Congress did not direct or require the Board to occupy the field to the full extent "permitted"—instead it only "empowered" the Board to do so.[12] Factually, the Board never has exercised its full judicial power but has always voluntarily limited its own jurisdiction, formally or informally. Also factually, both Congress and the Courts have been fully aware of this Board practice for a decade, and its propriety has never been questioned.[13] And while the majority opinion in the *Guss* case correctly states that "this Court has never passed" *directly* on the validity of this Board practice, the warning citation in footnote 7 to the *Denver* case[14] where this Court recognized that the Board "sometimes *properly* declines" to assert jurisdiction, certainly implies that the majority is not contrary minded. In fact the majority *Guss* opinion concludes that the Board "*can* greatly reduce" the no-man's-land by reasserting jurisdiction. It seems implicit that this Court would not have wasted a single moment describing as a legislative dilemma the unfortunate but true creation of a no-man's-land if that distasteful result could have been avoided by saying "the Board *must* completely erase" that vacuum by filling the void.

It is clear that the Act would not permit the latter solution. Section 10(a) only "empowers" the Board to prevent unfair practices; it does not direct or require it. As

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[12] See Section 10(a) of the Act.

[13] See citations, footnotes 3 and 4, dissenting opinion of Mr. Justice Burton herein.

[14] *Labor Board v. Denver Bldg. & Constr. Trades Council*, 341 U. S. 675, 684.

Mr. Justice Burton notes in the dissent, "The Board is not a Court whose jurisdiction over violations of private rights must be exercised." Thus it seems clear that Congress, the Federal Courts, the Board, the earlier decisions of this Court, the majority and minority Justices herein, and the parties hereto, all agree that the Board cannot be forced to exercise jurisdiction, or to hear and decide the questions presented, in these three cases or any other case in the vacuum area.

Otherwise stated, mandamus would not lie to compel the Board to entertain these cases. But if a tribunal has judicial or quasi-judicial jurisdiction it *must* be exercised; it has no power to decline to perform its required function and arbitrarily deny relief:

> "If * * * power and authority are plainly found in the Act, and the Commission erroneously refuses to exercise such power and authority, mandamus is the appropriate remedy to compel that body to proceed and to hear the case upon the merits." *United States. ex rel. v. I. C. C.*, 294 U. S. 50, 61.[15]
>
> "Where a case is stated within the jurisdiction and powers of an administrative agency, it is the duty of that agency to entertain it, and in a proper case mandamus will issue to compel it to do so, and to proceed and hear the case on its merits." 34 *Am. Jur.* 909, Mandamus Sec. 127.
>
> "Mandamus will lie to compel such administrative agencies to exercise the powers intrusted to them * * *" Ibid, Sec. 126.

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[15] See also *Interstate Commerce Commission v. U. S. Ex Rel.*, 224 U. S. 474; *U. S. ex rel. v. I. C. C.*, 252 U. S. 178; *U. S. ex rel. v. I. C. C.*, 246 U. S. 638; *N. L. R. B. v. Sterling Electric Motors*, 114 F. (2) 738, 741 (9 Cir.).

It is implicit in this Court's opinions herein that the Board can not be compelled to hear and decide, to "exercise" jurisdiction in the so-called no-man's-land. Congress did not desire it. The Act does not direct it. The Board can not accomplish it. But if judicial "jurisdiction and power" exist, it must be exercised. The "power" is clearly there. (Section 10(a) of the Act.) Inescapably, since mandamus does not lie, judicial jurisdiction must not exist. The Act and the Board's own declarations bear out this conclusion. The Act "empowers" the Board *to assert* jurisdiction but that permissible judicial jurisdiction lies "dormant and unexercised" until the Board extends it to a particular area as necessary to effectuate the policy of the Act. And this the Board has specifically declined to do with regard to the "sub-standard" no-man's land. By its own congressionally authorized action, the Board has no judicial jurisdiction over cases that fail to meet its announced standards!

Heretofore this Court has consistently made clear that it is the conflict between the exercise of state jurisdiction and federal jurisdiction over the same conduct that leads to application of the preemption doctrine. A multitude of cases are aptly summed up in the following quotation:

> "The care we took in the Garner case to demonstrate the existing conflict between state and federal administrative remedies in that case was, itself, a recognition that if no conflict had existed, the state procedure would have survived." *United Construction Workers v. Laburnum*, 347 U. S. 656, 665.

Now *for the first time* this Court sanctions an area where *neither* federal *nor* state judicial jurisdiction exists to govern conduct. *International Union v. W. E. R. B.*, 336 U. S. 245, held that where "conduct is governable by the

state or entirely ungoverned" *the state must act.*[16] The present decision instead votes for anarchy, for no-man's-land.

We submit that this decision which specifically sanctions an area where no judicial tribunal can or will exercise "jurisdiction" to hear and decide is violative of the fundamental concept of Due Process guaranteed by the 5th and 14th Amendments. This Court has defined that right as follows:

> "The due process clause requires that every man shall have the protection of his day in Court, and that benefit of the general law—a law which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which governs society." *Truax v. Corrigan*, 257 U. S. 312.

This principle is applicable to the field of labor law preemption. In one of the first cases on the original Wagner Act, this Court took pains to describe the Board procedure provided to satisfy the due process requirement:

> "The question in such cases is whether the legislature, in what it does prescribe, has gone beyond constitutional limits.
>
> "* * * The Act establishes standards to which the Board must conform. There must be complaint, notice, and hearing. The Board must receive evidence and make findings. The findings as to the facts are to

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[16] See also *Weber v. Anheuser-Busch*, 348 U. S. 468, and cases there cited. Contrast the situation presented in these cases where Board declination of jurisdiction is said to result in *no* tribunal having jurisdiction, with that presented by cases arising under 28 USCA § 1404(a), *forum non conveniens*, where one tribunal having jurisdiction is permitted to decline to exercise it because there is another *available* and more appropriate forum where a Day in Court can be obtained.

> be conclusive, but only if supported by evidence. The order of the Board is subject to review by the designated court, and only when sustained by the Court may the order be enforced. Upon that review all questions of the jurisdiction of the Board and the regularity of its proceedings, all questions of constitutional right or statutory authority are open to examination by the court. We construe the procedural provisions as affording adequate opportunity to secure judicial protection against arbitrary action in accordance with the well-settled rules applicable to administrative agencies set up by Congress to aid in the enforcement of valid legislation. * * *" *N. L. R. B. v. Jones & Laughlin S. Co.*, 301 U. S. 1, 46-47.

This "opportunity to secure judicial protection" which sustained the Wagner Act was still recognized in the *Garner* decision. There the Court denied state jurisdiction only after it established there was "no suggestion that the federal Board would decline to exercise its powers once its jurisdiction was invoked." It noted that Congress had taken in hand the "particular type of controversy" there involved and provided a Day in Court:

> "(Congress) went on to confide primary interpretation and application of its rules to a specific and specially constituted *tribunal* and prescribed a *particular procedure for investigation, complaint and notice, and hearing and decision, including judicial* relief pending a final administrative order. * * *" *Garner v. Teamsters*, 346 U. S. 485, 490. (Emphasis added.)

Again in *Laburnum* the Court noted that the plaintiff had a right for which there was a traditional state Court remedy for which the Act had "neither provided nor suggested any substitute." With due process obviously in mind, this Court sustained state exercise of jurisdiction to

provide the only available Day in Court with opportunity to be heard on the issue of damages.

> "* * * In the Garner Case, Congress had provided a federal administrative remedy, supplemented by judicial procedure for its enforcement, with which the state injunctive procedure conflicted. Here Congress has neither provided nor suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct. *For us to cut off the injured respondent from this right of recovery will deprive it of its property without recourse or compensation. To do so will, in effect, grant petitioners immunity from liability for their tortious conduct.* We see no substantial reason for reaching such a result. The contrary view is consistent with the language of the Act and there is positive support for it in our decisions and in the legislative history of the Act." *United Constr. Workers v. Laburnum*, 347 U. S. 656, 663. (Emphasis added.)

The Court in *Laburnum* further said:

> "Certainly the Act did not expressly relieve labor organizations from liability for unlawful conduct.
>
> "If Virginia is denied jurisdiction in this case, it will mean that where the federal preventive administrative procedures are impotent or inadequate, the offenders * * * may destroy property without liability for the damage done * * *.
>
> "The jurisdiction of the Supreme Court of Appeals of Virginia is, therefore, sustained. * * *" (loc. cit. 347 U. S. 666, 669.)

If constitutional considerations require exercise of state jurisdiction where federal remedies are "impotent or inadequate" certainly Due Process demands the same result where federal remedies are non-existent, as they admittedly are in "no-man's-land."

Furthermore, the conduct involved in the instant case was unlawful under state law and a state remedy was provided. The majority notes that the same conduct was, in each case, unlawful under the federal Act, though remediless under the federal judicial procedures. Is there any more reason to grant these law violators "immunity from liability for their tortious conduct" than there was in Laburnum? Such is the effect of the March 25 opinion! The no-man's-land concept thus further denies due process by removing the only remedy for an admitted wrong!

> "To give operation to a statute whereby serious losses inflicted by such unlawful means are in effect made remediless is, we think, to disregard fundamental rights of liberty and property, and to deprive the person suffering the loss of due process of law." *Truax v. Corrigan*, 257 U. S. 312, 330; 66 L. Ed. 254, 262.
>
> "Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded him some real opportunity to protect it." *Brinkerhoff-Faris T. & S. Co. v. Hill*, 281 U. S. 673, 682; 74 L. Ed. 1107, 1114.

A time-honored maxim states "no wrong without a remedy." In each of these three cases, the conduct was unlawful under state law. A wrong was done and a remedy was provided. The Act expresses no purpose to change that substantive law. Indeed as this Court noted, the Act declares this particular conduct unlawful as a matter of substantive federal law. There was no intention to destroy the right to a remedy—the Act provided a remedy to support that right where the controversy sufficiently affected commerce to warrant the Board's attention. But where the

Act's substitute remedy is not applicable on jurisdictional grounds, the admitted doubly-guaranteed right would become a hollow shell if the traditional, historic state remedy is also withheld. Rendering these admitted rights "remediless" by depriving persons "of all existing remedies" disregards fundamental principles and deprives the victim of Due Process of law. This the State may not do, as this Court has held in the above cases.

CONCLUSION.

We respectfully submit that the March 25, 1957, decision rendered herein adopts and sanctions a judicial no-man's-land doctrine that is repugnant to the Due Process Clause of the Constitution. The Constitutional guarantee of Due Process demands that any such theory of jural vacuum and judicial impotence be vigorously rejected. We believe that the brief discussion, *supra*, and the cases there cited demonstrates the gravity of the problem. We suggest that the total absence of any discussion of the effect of the Due Process Clause in any of the opinions herein, majority or dissent, indicates that this problem has indeed been overlooked, or at least not given the careful consideration it obviously deserves.

The seriousness of the situation is magnified when we consider the alternative in favor of which Due Process is violated, a Day in Court is denied, and State Courts are depotentiated. Has this decision even a chance of promoting "uniformity" in the sub-standard area? The federal law will not be uniformly enforced therein for the federal tribunal will not, and the state tribunals cannot, enforce it. The state laws cannot even be uniformly enforced within their own borders. Both state and federal laws can be consistently violated with complete impunity

by employer and union alike, just as has occurred in this trio of cases. It is futile to hope that the law of the jungle will produce anything but uniform chaos. We submit that the decisions herein which reluctantly sanctions denial of Due Process, *sub silentio*, do so without achieving any semblance of the desired "uniformity" that was hoped to be gained thereby.

We do not attempt in this limited petition to deal with the intricate implications or conflicting shades of meaning to be drawn from the *Bethlehem* case except to say that we earnestly suggest that the majority has misinterpreted its effect and application, probably through failure to appreciate the element of due process involved. But we suggest that, when that case is re-examined in the light of the Due Process clause, it will be seen that *Bethlehem* anticipated and stated the answer to the problem here involved. There this Court said that even where existence of federal power and coverage is admitted, and

> "even where extensive regulations have been made, if the measure in question relates to what may be considered a separate or distinct segment of the matter *covered* by the federal statute *and the federal agency has not acted on that segment* the case will be treated in a manner similar to cases in which the effectiveness of federal supervision awaits federal administrative regulation * * *. The states are in those cases permitted to use their police power *in the interval.*" (330 U. S. Loc. Cit. 774 (Emphasis added).)

With regard to the sub-standard enterprises now banished to no-man's-land, the March 25 opinions have demonstrated the federal "coverage." No one denies Congress' "power" to regulate therein. But clearly this no-man's-land is a "separate and distinct segment" of the mat-

ter broadly "covered." Clearly the "federal *agency* has *not acted* on that segment." Clearly the "effectiveness of federal supervision *awaits* federal *administrative regulation*"! The majority opinion specifically invites that *agency* to reduce the area of this segment "by *reasserting* its jurisdiction."

In such cases, *Bethlehem* holds, and the Due Process Clause requires, that the states are permitted to act "in the interval."

We make this final comment: Observance of the due process requirement as herein proposed does not impinge on the "exclusive" power Congress granted the Board. The "inescapable implication of exclusiveness" mentioned by the majority derives from the second sentence of Section 10(a): "*This power* shall not be affected by any other means of adjustment or prevention * * *." What is "this power" which is exclusive? The first sentence provides "the Board is enpowered * * * to prevent" unfair practices. Such power "to prevent" is not affected by state regulation in the interval of non-regulation by the Board. Any time the Board determines that it wishes to exercise its power, the "interval" is automatically terminated thereby.

We therefore respectfully request that this petition for rehearing be granted.

Respectfully submitted,

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Certificate of Counsel.

This is to certify that this petition is presented in good faith, and with the honest and sincere belief of counsel as expressed herein and not for delay.

STANLEY DENLINGER.

April 16, 1957.